No. 05-5966

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| Title: | Eric Michael Clark, Petitioner<br>v.<br>Arizona |
| Docketed: | August 24, 2005 |
| Lower Ct: | Court of Appeals of Arizona, Division One |
| Case Nos.: | (1 CA-CR 03-0851, 1 CA-CR 03-0985) |
| Decision Date: | January 25, 2005 |
| Discretionary Court Decision Date: | May 24, 2005 |

**Questions Presented**

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Jan 5 2005 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 30, 2006. |
| Aug 17 2005 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 23, 2005) |
| Sep 6 2005 | Waiver of right of respondent Arizona to respond filed. |
| Sep 15 2005 | DISTRIBUTED for Conference of October 7, 2005. |
| Sep 20 2005 | Record Requested . |
| Sep 21 2005 | Response Requested . (Due October 21, 2005) |
| Oct 13 2005 | Record received from the Court of Appeals State of Arizona and in the Superior Court of the State of Arizona in and for the County of Coconino (three boxes). |
| Oct 21 2005 | Brief of respondent Arizona in opposition filed. |
| Nov 3 2005 | DISTRIBUTED for Conference of November 23, 2005. |
| Nov 28 2005 | DISTRIBUTED for Conference of December 2, 2005. |
| Dec 5 2005 | Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. |
| Dec 28 2005 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 30, 2006. |
| Jan 4 2006 | Consent to the the filing of amicus briefs in support of either party received from counsel for the petitioner. |
| Jan 4 2006 | Motion to appoint counsel filed by petitioner Eric Michael Clark. |
| Jan 6 2006 | Consent to the filing of amicus briefs in support of either party received from counsel for the respondent. |
| Jan 30 2006 | Joint appendix filed. (Joint appendix in two volumes). |
| Jan 30 2006 | Brief amici curiae of American Psychiatric Association, et al. filed. |
| Jan 30 2006 | Brief of petitioner Eric Michael Clark filed. |

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| Jan 30 2006 | Brief amicus curiae of Treatment Advocacy Center filed. |
| Jan 30 2006 | Brief amici curiae of American Association on Mental Retardation, et al. filed. |
| Feb 22 2006 | Motion DISTRIBUTED for Conference of March 17, 2006. |
| Mar 6 2006 | SET FOR ARGUMENT Wednesday, April 19, 2006. |
| Mar 6 2006 | Brief amicus curiae of United States filed. |
| Mar 6 2006 | Brief amicus curiae of Citizens Commission on Human Rights filed. |
| Mar 6 2006 | Brief amicus curiae of Massachusetts, et al. filed. |
| Mar 6 2006 | Brief of respondent Arizona filed. |
| Mar 8 2006 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Mar 17 2006 | CIRCULATED. |
| Mar 20 2006 | Motion to appoint counsel filed by petitioner GRANTED. David Goldberg, Esquire, of Flagstaff, Arizona is appointed to serve as counsel for the petitioner in this case. |
| Mar 27 2006 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Mar 29 2006 | Motion DISTRIBUTED for Conference of April 14, 2006. |
| Apr 10 2006 | Reply of petitioner Eric Michael Clark filed. (Distributed) |
| Apr 19 2006 | Argued. For petitioner: David I. Goldberg, Flagstaff, Ariz. (Appointed by this Court.) For respondent: Randall M. Howe, Chief Counsel, Office of the Attorney General, Phoenix, Ariz.; and Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) |

No. 05-5986

**IN THE SUPREME COURT OF THE UNITED STATES**

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ERIC MICHAEL CLARK,

*Petitioner,*

vs.

STATE OF ARIZONA,

*Respondent.*

AUG 1 2005

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**ON PETITION FOR CERTIORARI TO THE ARIZONA COURT OF APPEALS**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether Arizona's insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

(2) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

## PARTIES TO THE PROCEEDINGS BELOW

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Petitioner, Eric Michael Clark ("Clark"), hereby prays that a writ of certiorari issue to review the judgment of the Arizona Court of Appeals as follows.

## OPINIONS AND ORDERS BELOW

The memorandum decision of the Arizona Court of Appeals affirming Appellant's conviction and sentence is unpublished. *State v. Clark,* No. 1 CA-CR 03-0851 and 1 CA 03-0985 (consolidated) (Ariz. App, Div. 1, January 25, 2005.) Appendix A. The order of the Arizona Supreme Court denying discretionary review of the decision of the Arizona Court of Appeals is also unpublished. *State v. Clark,* No. CR 05-0047 PR (Ariz., May 25, 2005.) Appendix B.

## JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review the judgment of the Arizona Court of Appeals is invoked under 28 U.S.C. § 1257(a), petitioner having asserted below and asserting before this Court, the deprivation of rights secured by the United States Constitution.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

U.S.C. Constitution, Amendment XIV provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 13-502 of the Arizona Revised Statutes (1996) provides in pertinent part:

> A. A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. . . .

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

Clark was charged and convicted of the first degree murder of Flagstaff Arizona Police Officer Jeffrey Moritz. The Indictment alleged that on June 21, 2000 Clark "intentionally or knowingly" caused the death of a police officer while in the line of duty. (R.O.A.-Doc. 3.)

Clark was 17 years old at the time of the shooting and although there were no eyewitnesses, there was minimal doubt that he in fact shot the officer after the two exchanged gun fire following a traffic stop at 4:50 a.m. in Clark's residential neighborhood. (See generally, Appendix A at 3-5, 8-9.)

Clark's defense at trial was that he was guilty except insane of either the charge of first degree murder or a lesser included offense. (ROA-Doc. 257.) Alternatively, Clark's defense was that as a result of his mental illness he did not have the requisite necessary mental state for the charged offense. In other words, Clark asserted that due to his mental illness he did not intentionally or knowingly kill a police officer so was guilty of a less serious form of homicide. (ROA-Doc. 362; R.T. 8/5/03 at 16-18.) The trial court refused to consider the expert testimony or any other evidence for this purpose of rebutting *mens rea* on the grounds that Arizona law prohibited it. (R.T. 8/19/03 at 5-6.)

All of the numerous mental health experts who examined Clark during the three years before trial agreed that he suffered from the mental disease of schizophrenia, paranoid type, at the time of the shooting and was actively psychotic at the time of the crime. (R.T. 7/10/02 at 16-17, 151-52, 156, 162, 177; R.T. 7/11/02 at 76-88, 103; R.T. 6/26/02 at 12-16, 33, 105-06 Cause M.H. 2000-0080[1], R.T. 9/19/00 at 47-48, 54, 83, 87-89, 90-92; ROA-Doc. 7-192.)

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[1] Immediately following his arrest Petitioner was determined in separate mental health proceedings before a different trial judge, pursuant to Arizona Revised Statutes, Title 36, to be suffering from psychosis and paranoid schizophrenia and therefore gravely disabled and a danger to himself and others. As a result of that proceeding Clark was committed to the Arizona State Hospital for treatment. (Cause MH 2000-0080, R.T. 9/19/00 at 124-27.) Petitioner was also determined by the trial judge in separate proceedings, pursuant to

Two experts testified at trial and both relied extensively upon the previous mental health evaluations in reaching their ultimate conclusions. (R.T. 8/26/03 at 10; trial exhibits 94, 99.) Dr. Barry Morenz, a psychiatrist, testified on behalf of Clark and opined that he suffered from paranoid schizophrenia at the time of the shooting and that it was "highly probable" that he "did not understand right from wrong" at the time of the shooting. (R.T. 8/22/03 at 37-41, 59.) Petitioner also presented the testimony of numerous lay witnesses who observed Clark in the years leading up to the shooting and opined that when he participated in unrelated violent incidents and bizarre behaviors he did not appear to know what he had done or know that what he had done was wrong. (R.T. 8/12/03 at 49-53; R.T. 8/19/03 at 99, 113-14; R.T. 8/20/03 at 135; R.T. 8/21/03 at 7, 26, 73.)

The State conceded at trial that Clark "was suffering from a mental disease or defect" at the time of the shooting but alleged that he understood right from wrong so was therefore not legally insane under Arizona law. (R.T. 8/12/03 at 26; R.T. 8/22/03 at 61.) The State's expert, John Moran,

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Rule 11, *Arizona Rules of Criminal Procedure*, to be incompetent to stand trial and was further committed to the Arizona State Hospital for treatment and restoration to competency which took nearly three years. (ROA-Docs. 16, 18, 156-57, 253; R.T. 3/28/01 at 2-6; R.T. 8/8/01 at 2-3; R.T. 6/26/02, 7/10/02, 7/11/02.) Ultimately, Clark was determined to be competent and his trial was held to the bench. (ROA-Docs. 304-05; R.T. 5/8/03 at 2-3; R.T. 7/28/03 at 2-11.) The parties stipulated that the court could consider all previous mental health testimony including that before the court in the competency and Title 36 proceedings, all of which were part of the record on direct appeal. (See, ROA-Doc. 358; Arizona Court of Appeals Order dated 1/28/04.)

PhD, a psychologist, agreed that Clark was clearly mentally ill and psychotic at the time of the crime. Moran ruled out malingering and concluded that Clark was "overtly paranoid with delusions . . . and/or hallucinations." Ultimately, however, Moran concluded that Clark knew right from wrong at the time of the crime so was not legally insane. (R.T. 8/26/03 at 25-29, 35, 54-67 91, 133-36, 171-73.)

## II. PROCEDURAL HISTORY

On September 3, 2003, after taking the matter under advisement following an 11 day trial to the bench, the trial court found Clark guilty of first degree murder and that he had failed to prove (as required under Arizona law) by clear and convincing evidence that he was insane at the time of the crime. (ROA-Doc. 391-392; R.T. 9/3/03 at 4-6.) The trial court sentenced Clark to the minimum sentence of life in prison with eligibility for parole after serving 25 years. (ROA-Doc. 401-402; R.T. 10/2/03 at 73.)

Petitioner filed a Motion to Vacate Judgment on October 2, 2003 raising several additional federal and state constitutional challenges to his conviction and Arizona's insanity law. (ROA-Doc. 406.) The trial court denied the Motion to Vacate. (ROA-Doc. 424.)

Petitioner's direct appeal to the Arizona Court of Appeals was denied following briefing and argument by memorandum decision issued January

25, 2005. (Appendix A.)The Arizona Supreme Court denied Clark's discretionary Petition for Review by Order dated May 25, 2005. (Appendix B.) On June 10, 2005 the Arizona Court of Appeals issued its Order staying the issuance of the mandate of its decision to permit Petitioner leave to file this Petition for Writ of Certiorari. (Appendix C.)

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

**The Arizona Court of Appeals incorrectly held that A.R.S. §13-502(A) complies with due process by misinterpreting and misapplying this Court's precedent. Arizona's insanity law violates due process by prohibiting the consideration of evidence of the firmly rooted common law defense of insanity as set forth in the *M'Naghten* Rule. Arizona law further violates due process by precluding evidence of mental infirmity to rebut the state's evidence of *mens rea*. Petitioner was deprived of his fundamental rights to present a complete defense, to the presumption of innocence and to have the charges proved beyond a reasonable doubt. This Court should grant a writ of certiorari to clarify these issues of national importance and the limitation upon a state's power to abolish these defenses and limit the introduction of exculpatory evidence.**

History of Arizona's insanity law.

One of the earliest formulations of the legal test for insanity came in *M'Naghten's Case* in 1843. According to that often cited case:

> "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

*State v. Schantz*, 98 Ariz. 200, 205, 403 P.2d 521 (1965)(quoting, The House of Lords, 10 Clark & Fin. 200, 8 Eng. Reprint 718, 722 (1843)).

This test of legal insanity was a restatement of the test for insanity "as it was known to the common law of England." *Id.* (citing, *Rex v. Arnold*, 16 Howell St. Tr. 695, 764 (1724)). Prior to statehood and early in Arizona's history the courts adopted as a matter of common law the Rule of *M'Naghten's* Case as the test for legal insanity. *See, Lauterio v. State*, 23 Ariz. 15, 201 P. 91 (1921); *Foster v. State*, 37 Ariz. 281, 290, 294 P. 268 (1930); *Judd v. State*, 41 Ariz. 176, 183-84, 16 P.2d 720 (1932). Over time Arizona courts uniformly adopted both prongs of the *M'Naghten* test and, specifically, both aspects of the second prong.

Originally, under Arizona common law a defendant was presumed to be sane and bore only an initial burden of producing sufficient evidence to raise a reasonable doubt as to his or her sanity. Once the defendant sufficiently raised the issue of insanity the common law rule placed the burden on the State to establish the converse, that the defendant was sane, beyond a reasonable doubt. *State v. Daniels*, 106 Ariz. 49, 478 P.2d 522 (1970); *State v. Cano*, 103 Ariz. 37, 436 P.2d 586 (1968).

Since early territorial days Arizona continued to recognize that insanity excused completely a defendant's criminal culpability. Ariz. Pen. §

21 (1901) and by case law followed the *M'Naghten* test. Arizona's legislature formally adopted the *M'Naghten* test in 1978 when it promulgated A.R.S. § 13-502 which in its original form provided:

> "A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from a mental disease or defect as not to know the nature and quality of the act, or if such person did know that he did not know that what he was doing was wrong."

1977 Ariz. Sess. Laws, ch. 142, § 5.

With its passing of the 1978 Arizona Criminal Code the legislature also abolished all common law affirmative defenses unless specifically adopted by statute. 1977 Ariz. Sess. Laws, ch. 142, § 39.

Like many states, Arizona modified its insanity laws in 1983 following John Hinckley's acquittal by reason of insanity on his charges relating to the attempted assassination of President Ronald Reagan. The 1983 modification placed the burden of proof upon the defendant and raised it to clear and convincing evidence. A.R.S. § 13-502(C) (1983). Ten years later the Arizona legislature completely revamped the statute by eliminating entirely the not guilty by reason of insanity defense and in place adopting a "guilty except insane" defense and verdict. "The new statute essentially abandoned the first prong of the *M'Naghten* test, limiting the availability of the insanity defense to a person who, at the time of the criminal act, was

'afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.'" *State v. Tamplin,* 195 Ariz. 246, 248, 986 P.2d 914 (App. 1999).

Thus, at the time of Clark's trial Arizona law provided that he bore the burden of proving by clear and convincing evidence that he suffered from a mental disease that caused him to not know that his act of shooting the police officer was wrong.

(1) Arizona's abolition of the "nature and quality of the act" aspect of the *M'Naghten* insanity test violates Petitioner's right to due process by precluding him from exercising a fundamental right recognized at common law. The Arizona Court of Appeals misinterpreted and misapplied this Court's decisions in *Medina v. California,* 505 U.S. 437, 449 (1992) and *Paterson v. New York,* 432 U.S. 197, 201-02 (1977). This Court should grant the writ to address this issue of national importance.

The Arizona Court of Appeals rejected Petitioner's due process challenge to the Arizona legislature's abolishment of the "nature and quality of the act" aspect of the *M'Naghten* test by relying upon this Court's decisions in *Medina v. California,* 505 U.S. 437, 449 (1992) and *Paterson v. New York,* 432 U.S. 197, 201-02 (1977). (Appendix A at ¶ 37.) This ruling misinterprets and improperly expands the Court's limited ruling in those cases as to one that sanctions the complete abolishment of the insanity defense. In reality, this Court has never directly addressed this issue of national importance. This Court should grant the writ because the lower

court's decision involved an important question of federal law in a way that both conflicts and distorts this Court's prior decisions and because this Court has never squarely decided this issue of national importance. Rule 10(C), Supreme Court Rules.

**a) The Arizona Court of Appeals' decision is contrary to and misinterprets this Court's precedent.**

In *Medina* this Court held that "*procedural* due process" was not violated by placing the burden of proving incompetence on the defendant as there was insufficient evidence of the "historical treatment of *the burden of proof* in competency proceedings" to conclude otherwise. Within the context of this limited procedural issue this court noted in passing that "we have not said that the Constitution requires the States to recognize the insanity defense." 505 U.S. at 449 (citing *Powell v. Texas*, 329 U.S. 514, 536 (1982)). It is clear that this Court's pronouncements in *Medina, Powell* and later cases reached only the *procedures* a state implements or chooses not to implement to prove insanity, not the substantive defense itself or more fundamental right to contest the State's case on the fundamental element of *mens rea*.

This distinction was made clear by the Court in *Leland v. Oregon*, 343 U.S. 790 (1952). In *Leland* this Court rejected Petitioner's due process challenge to the state's procedure of placing a beyond a reasonable doubt

burden of proof on a defendant asserting the insanity defense. While the Court did not adopt one procedure or test for establishing insanity, it noted that the state was still required to prove every element of the charge beyond a reasonable doubt and therefore the method chosen by Oregon did not violate a basic standard of justice. By not sanctioning any given procedure the court implied that the substantive defense of insanity is a fundamental principle of our system of justice. *Id.* at 799.

Similarly, in *Paterson v. New York*, 432 U.S. 197, 201-02 (1977) this Court similarly held that due process was not offended by a New York law that placed the burden of proving the affirmative defense of extreme emotional disturbance upon the defendant. It was within the context of this *procedural* issue that this Court stated: "it is normally 'within the power of the State to regulate *procedures* under which its laws are carried out, including the burden of producing evidence and the burden of persuasion . . .' " *Id.* (citations omitted.)

Neither of the foregoing statements were essential to this Court's decisions since both cases involved only the *procedures* for establishing competency or a mental health defense and not the *substantive* defense of insanity as it has been historically recognized in the common law. This Court's statements were therefore *dicta* improperly applied by the Arizona

Court of Appeals. *See, State v. Searcy,* 798 P.2d 914 923 (Idaho 1990)("Thus, it cannot be said that by allowing the burden of proof to be shifted away from the prosecution on issues which are not elements of the crime charged, the Supreme Court is thereby sanctioning the abolition of the underlying substantive criminal legal traditions.")

The origins of the misinterpretation of this Court's holding in *Medina* comes from *dicta* in *Powell v. Texas,* 329 U.S. 514, 536 (1982) where the issue was whether a statute that punished public drunkenness violated the Eighth Amendment by punishing an involuntary status rather than a voluntary criminal act. In rejecting appellant's position, the Court stated:

> The doctrines of *actus reas, mens rea,* **insanity,** mistake and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States. *Id.* (bold added.)

As more recently recognized:

> "When read in context, the comments in *Powell* support the Supreme Court's longstanding policy to generally permit the states to determine the details of how to implement well-established doctrines. In other words, how a state chooses to present the issue of legal insanity is left up to state law. *Powell* cannot be read to stand for the proposition that the concept of legal insanity, i.e., an inability to form the requisite mens rea, is not a fundamental principal of our jurisprudence entitled to protection under the Due Process Clause." *Finger v. State,* 27 P.3d 66, 83 (Nev. 2001).

The distortion finds further fictional support from Justice Rehnquist's *dissenting* opinion in *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) where he wrote: "It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant." Reliance upon this misplaced *dictum* confuses the fundamental difference between the *substantive* defense of insanity from the *procedural* aspects of the defense. *Cf., State v. Fletcher*, 149 Ariz. 187, 192, 717 P.2d 866, 891 (1986)(Insanity "is a *substantive* matter affecting the guilt or innocence of a defendant.") The Arizona Court of Appeals' decision has confused substantive and procedural law and should be vacated by this Court as a matter of due process.

**b) The Court has not yet directly addressed this issue of national importance.**

Notwithstanding the lower court's misinterpretation of both *Medina* and *Patterson*, this Court has actually never directly addressed this issue, and never held that a State may, consistent with due process, abolish the insanity defense as it existed at common law. *State v. Searcy*, 798 P.2d 914 923 (Idaho 1990)("there is no explicit holding from the United States Supreme Court on this issue. . . .") This issue does not simply involve this Petitioner and Arizona's abolishment of a substantial portion of the insanity

defense. This issue also involves a body of law which appears to stand alone as a jurisdiction that both greatly curtails the insanity defense as recognized at common law while also prohibiting consideration of this type of evidence on the issue of *mens rea.* This treatment of these long recognized interrelated defenses does not comport with the federal treatment of such evidence. *See, United States v. Pohlot,* 827 F.2d 889 (3rd Cir. 1987)(discussing the legislative history of the Insanity Defense Reform Act of 1984 in detail and interpreting the Act as limiting the affirmative defense of insanity to the traditional *M'Naghten* Rule *and* also permitting such evidence on the issue of *mens rea.* Noting that Congress refused to abolish the insanity defense because it "would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." Quoting H.R.Rep. No. 98-577, 98th Cong. 1st Sess. at 7-8 (1983)).

This Court should grant the writ because this issue impacts a growing number of states that have in the recent past abolished the insanity defense completely or severely limited its application (some of which survived constitutional scrutiny by the legislature's enactment of a *mens rea* defense in place of the insanity defense.) The various states do not uniformly address this issue as a matter of federal due process. *See, State v. Bethel,* 66 P.3d 840 (Ka. 2003) cert. denied 540 U.S. 1006 (2003)("Each of those legislatures'

actions abolishing the insanity defense an substituting alternative procedures for considering a criminal defendant's mental condition at the time of the offense was held to constitutional."); *Finger v. State*, 27 P.3d 66 (Nev. 2001) cert. denied 534 U.S. 1127 (2002) ("While courts and scholars may debate what standard or definition should apply in determining what constitutes legal insanity, or by what method it should be raised, all have agreed that due process requires that a defendant be able to present evidence and argue that he or she lacked the *mens rea* to commit the criminal act."); *State v. Herrera*, 895 P.2d 359 (Ut. 1995); *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Korell*, 690 P.2d 992 (Mont. 1984).

Historically, however, numerous states have held that abolishing both the insanity defense and consideration of such evidence to contest *mens rea* does not comport with federal due process. *See, Sinclair v. State*, 132 So. 581 (Miss. 1931)(holding unconstitutional a statute that provided that insanity was not a defense to murder since the crime involves specific intent); *State v. Lange*, 123 So. 639 (La. 1931)(abolishing the insanity defense while also not permitting such evidence to contest *mens rea* violates due process); *State v. Strasburg*, 110 P. 1020 (Wa. 1910) (abolishing the insanity defense as to any crime violates due process).

This Court should grant the writ since Arizona has chosen to be in the ever shrinking minority of states that refuse to permit consideration of mental infirmity evidence on the issue of *mens rea* (see argument (3) below) and also abolished a substantial portion of the insanity defense. This combination violated Petitioner's fundamental right to present a defense and therefore violates due process.

**c) The *M'Naghten* Rule is deeply rooted in the common law. Abolishing the Rule without providing for a *mens rea* defense violates due process.**

The touchstone of due process is fundamental fairness. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)(Due process mandates protection of those principals deemed "fundamental to the American scheme of justice.") A state's decision regarding the administration of justice is subject to proscription under due process if "it offends some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 201-02. Due process guarantees a defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Due process also protects a defendant's right "to present the defendant's version of the facts as well as the prosecution's to the jury so it may determine where the truth lies." *Washington v. Texas*, 338 U.S. 14, 19 (1967).

The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). The insanity defense "has its roots in ancient Judaic, Christian and Roman Law." *Neely v. Newton*, 149 F.3d 1074, 1079 (10th Cir. 1998).

This Court's pronouncements over the past century reveal how ingrained the insanity defense, and the *M'Naghten* Rule in particular, have been as a part of substantive criminal law. In *Davis v. United States*, 160 U.S. 469 (1895) this Court recognized the deep historical roots and universal acceptance of the insanity defense. The Court stated:

> "No one we assume, would wish either the courts or juries, when trying a case of murder, to disregard the humane principle, existing at common law and recognized in all the cases tending to support the charge of the court below, that 'to make a complete crime cognizable by human laws, there must be both will and an act.'" . . . .
>
> "Although the killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears, yet 'in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease, his intellectual power is for the time obliterate, he is not a responsible moral agent, and is not punishable for criminal acts.' Com. v. Rogers, 7 Metc. (Mass.) 501. Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to found any dissent from these general propositions." *Id.* at 484-85.

More recently the Court recognized that the law protects those who are incompetent and unable to form the requisite mens rea from being punished by acquittal through the common law principle of insanity. Justice O'Connor wrote:

> "The common law prohibition against punishing 'idiots' for their crimes suggest that it may be 'cruel and unusual' punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment."

*Penry v. Lynaugh*, 492 U.S. 303, 333 (1989).

Legal historians have traced the first recognition of the need to treat a mentally ill person different in the context of criminal punishment to the sixth century, B.C.

> "As early as the sixth century B.C., commentary on the Hebrew scriptures distinguished between the harmful acts traceable to fault and those that occur without fault. To those ancient scholars, the paradigm of the latter type of act was one committed by a child, who was seen as incapable of weighing the moral implications of personal behavior, even when willful; retarded and insane persons were likened to children."

Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J.Hist.Behav.Sci. 335, 366 (1965).

Legal insanity has been an established concept of English common law for centuries. "The insanity defense existed as an excuse to crime by the

time of the reign of Edward I (1272-1307)." *State v. Searcy*, 798 P.2d 914, 928-33 (Idaho 1990)(McDevitt, J., dissenting)(citing III Holdsworth, *A History of English Law*, 371 (1908)(extensively tracing the roots of the insanity defense and right and wrong formulation). "Since the reign of Edward II (1307-1321), English law acknowledged that an individual who *does not know what he is doing or that what he is doing is wrong* cannot be held criminally liable." *Searcy, supra.*, 798 P.2d at 928 (quoting, Briggs, *The Guilty Mind*, at 82 (1955)(emphasis added)).

By 1724 English commentators readily accepted that guilt "of offending against any Law whatsoever, necessarily supporting a willful disobedience, can never justly be imputed to those who are *either incapable of understanding it, or of conforming themselves to it.*" *Searcy, supra.*, 798 P.2d at 929 (quoting Hawkins, *A Treatise of the Pleas of the Crown*, vol. I, p. 1 (1724)(emphasis added.)The Arizona Supreme Court has also recognized that the *M'Naghten* Rule "was in substance the test of legal insanity as it was known to the common law of England." *State v. Schantz*, 98 Ariz. 200, 210-14, 403 P.2d 521, 531-34 (1965).

As more recently observed:

> "[R]ecognition of insanity as a defense is a core principle that has been recognized for centuries by every civilized system of law in one form or another. Historically, the defense has been formulated differently, but given the extent of knowledge

> concerning principles of human nature at any given point in time, the essence of the defense, however formulated has been that *a defendant must have the mental capacity to know the nature of his act* ***and*** *that it is wrong.*

*State v. Herrera*, 895 P.3d 359, 372 (Utah 1995)(Stewart, J. dissenting) (emphasis added.)

The decision below also neglects to consider that Arizona has abolished a significant component of the long standing common law *M'Naghten* Rule after previously abolishing all common law defenses including diminished capacity.[2] This oversight fails to recognize the inseparable relationship between legal insanity and *mens rea*. These limitations violate due process, not simply because the insanity defense has been recognized from the early beginnings of criminal law, but because these limitations violate a defendant's fundamental right to present a *complete* version of the facts and to present a *complete* defense. *See, California v. Trombetta*, 467 U.S. 479, 485 (1984); *Washington v. Texas*, 338 U.S. 14, 19 (1967). *See also, Morissette v. United States*, 342 U.S. 246, 250-51 (1952)("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the

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[2] *See, State v. Schantz*, 98 Ariz. 200, 210-14, 403 P.2d 521, 531-34 (1965) (discussing the legislature's decision to reject the Model Penal Code provision allowing evidence of mental disease or defect when relevant to whether a defendant possessed the requisite state of mind.) *See also* A.R.S. § 13-103(A).

human will and a consequent ability and duty of the normal individual to choose between good and evil.")

In *Finger, supra,* the Nevada Supreme Court specifically held that the insanity defense is a fundamental aspect of criminal law that may not be abolished without violating due process. After an exhaustive tracing of the history of the insanity defense in American jurisprudence the court concluded:

> "Insanity is a mental condition that interferes with the ability of a person to form criminal intent. Individuals are considered to be legally insane when their mental condition rises to a level so as to relieve them of criminal culpability for their actions because they are incapable of developing the necessary mens rea. Where the mens rea of a crime requires that defendants understand the *nature and consequences of their conduct and that the conduct is wrong,* then legal insanity is established when one of these two elements is missing. This is the *M'Naghten* Rule. The Legislature cannot abolish the concept of legal insanity." 27 P.3d at 91.

The Nevada Supreme Court did not rely exclusively upon its belief that the *mens rea* element of a crime includes the concept of wrongfulness. In addition, the *Finger* Court recognized, more fundamentally, that there is an interrelationship between being legally insane and being unable to formulate the requisite *mens rea* to commit the crime.

> "*Mens rea* is a fundamental aspect of criminal law. Thus it follows that the concept of legal insanity, that a person is not culpable for criminal act because he or she cannot form the necessary mens rea, is also a fundamental principle. Indeed the

> term "legal insanity" simply means that a person has a complete defense to a criminal act based on the person's inability to form the requisite criminal intent. . . .
>
> It is because legal insanity is a corollary of *mens rea*, the mental state that imposes criminal responsibility upon an individual, that legal insanity is a fundamental principle under the Due Process Clause." *Id.* at 80.

The Court of Appeals also incorrectly concluded that the first prong of *M'Naghten* (nature and quality of the act) did not "add significantly to the test available in the statute." (Appendix A at ¶ 38 citing *Foucha v. Louisiana*, 504 U.S. 71, 97-99 (1992)(Kennedy, J. dissenting.) *Foucha*, of course, had nothing to do with the State's power to abolish a defense recognized at common law but dealt with a state's right to further confine a person after being found not guilty by reason of insanity.

The appellate court's conclusion ignores the reality of cases such as this where everyone agrees that the defendant is psychotic and not in touch with reality, but ignores that distorted reality for a fiction that one who knows right from wrong but does not operate in reality is "sane." This reasoning assumes that the first prong means only that the defendant does not know what the act is that he is doing. The absurdity of this conclusion is evidenced by the following simple example:

> "So, if a jury believes he was suffering from a delusional state, and if the facts as he believed them to be in delusional state would justify his actions, he is insane and entitled to

> acquittal. If, however, the delusional facts would not amount to a legal defense, then he is not insane. Persons suffering from a delusion that someone is shooting at them, so they shoot back in self-defense are insane under *M'Naghten.* Persons who are paranoid and believe that the victim is going to get them some time in the future, so they hunt them down first, are not. "

*Finger, supra,* 27 P.3d at 84-85.

This important distinction between the two aspects of the second prong of *M'Naghten* was clearly recognized by the United States Justice Department which fought for the continued federal codification of the complete defense. Then Attorney General William French Smith argued:

> "Under any approach, the Government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by statute. In the rare case, therefore, in which a defendant is so deranged that, for example, *he did not know that he was shooting a human being, one of the elements of the offense could not be proved - the mental element of mens rea* – and he could not be convicted under current law or under any constitutionally supportable change in the law."

*Poholt, supra.*, at ¶ 69 (quoting *Hearings on Bills to Amend Title 18 to Limit the Insanity Defense, Senate Judiciary Committee,* 97th Cong., 2d Sess. 30 (1982) (emphasis added).

To illustrate further the impact of Arizona's law in the instant case: If Clark, in his delusional state, believed that Officer Moritz was an alien that was trying to kill him then he would be guilty except insane under the first prong of *M'Naghten* since he would not understand the nature and quality of his acts even though he may know killing is "wrong." Under the current

Arizona law this is not legal insanity since Clark supposedly knew that killing was wrong. The abolishment of the first prong therefore precluded the trial court from considering that Clark was insane because he believed he was being attacked by an alien,[3] which would be insanity under traditional *M'Naghten* and current federal law. In a case where everyone agrees the defendant was psychotic (not in touch with reality) due process requires consideration of the fact that the defendant did not understand the nature and quality of his acts. The writ should issue.

(2) Arizona's refusal to permit the consideration of exculpatory *mens rea* evidence violates due process. The Arizona Court of Appeals decision in this case, that relies upon the Arizona Supreme Court's decision in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) is contrary to and misinterprets this Court's decisions in *United States v. Fischer*, 328 U.S. 463 (1946) and *Montana v. Egelhoff*, 518 U.S. 37 (1996) and the majority of federal precedent. This Court should grant the writ to clarify this issue of national importance as a majority of states and federal jurisdictions recognize that *mens rea* evidence is mandated by due process.

**a) The Arizona Supreme Court's decision is contrary to and misinterprets this Court's precedent.**

The Arizona Court of Appeals did not reach this issue as it recognized that it was constrained by the Arizona Supreme Court's decision in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997). (Appendix A at ¶ 45.) In *Mott*

[3] There was substantial evidence presented at trial that Clark believed his home town had been taken over by aliens and that very few humans remained. Clark further believed that he was being held captive and tortured by the aliens and the only way to destroy the aliens was with bullets. (See e.g., MH 2000-0080, R.T. 9/19/00 at 84; R.T. 8/20/03 at 42-45, 130-32, 136; R.T. 8/21/03 at 24-25; R.T. 8/26/03 at 18-21, 103-11.)

the Arizona Court precluded expert testimony on the battered woman syndrome offered in by a defendant charged with intentional child abuse and first degree murder to show that she could not form the *mens rea* required for conviction. Ultimately the Court overruled prior case law and established a blanket rule that prohibited the introduction of any evidence of mental defect unless offered in support of the statutory insanity defense. The *Mott* Court concluded that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *Id.* at 541.

The Court of Appeals decision in this case and the *Mott* decision are premised upon the misinterpretation of this Court's decisions in *United States v. Fischer*, 328 U.S. 463 (1946) and *Montana v. Egelhoff*, 518 U.S. 37 (1996), neither of which addressed whether precluding a defendant from offering factual evidence regarding an *involuntary* mental illness to rebut the government's evidence or negate *mens rea* violates due process. Neither case squarely reached the issue.

In *Fischer* this Court held only that due process did not mandate that the District of Columbia permit the use of the "diminished responsibility" defense. That holding is consistent with this Court's long standing view that it is not the place of the federal judiciary to regulate the criminal law

doctrines of "*mens rea, actus rea*, insanity, mistake, justification and duress." *Egelhoff*, 518 U.S. at 516. However, this Court was not determining whether the District of Columbia could, consistent with due process, prohibit the introduction and consideration of evidence of mental infirmity to rebut the government's case for *mens rea*. In fact, in *Fischer* the trial court permitted the defendant to introduce psychiatric testimony from which the jurors were instructed they could infer he did not possess the requisite mental state. The jury was actually permitted to find the defendant guilty of either first or second degree murder or manslaughter based upon its consideration of his mental state from all of the evidence. The only matter this Court sanctioned was the trial court's refusal to instruct the jury on the diminished responsibility *defense*." 328 U.S. at 466-67, n. 3.

It has long been recognized that there is a substantial distinction between the "diminished capacity *defense*" (addressed by this Court in *Fischer*) and "diminished capacity *evidence*." "The first variant of what courts have called 'diminished capacity' defenses inappropriately is the evidentiary doctrine which . . . is not a defense at all but merely a rule of evidence: specifically, the admission of evidence of mental abnormality to negate *mens rea*." "A second strain of diminished capacity permits a defendant to show not only that he lacked the *mens rea* in a particular case

but also that he lacked the *capacity* to form *mens rea.*" *Poholt, supra.*, 827 F.2d at 903. "Properly understood, it is . . . not a defense at all but merely a rule of evidence." *Id.* at 897. *See also, State v. Phipps,* 883 S.W.2d 138, 143 (Tenn.Cr.App. 1994)("In actuality, diminished capacity is not a defense that absolves the accused from culpability; rather, it is a rule of evidence which allows the introduction of evidence to negate the existence of specific intent when a defendant is charged with a specific intent crime.")

It is this distinction, between offering this evidence as an affirmative *defense* and as *rebuttal evidence* that was confused by the Arizona Supreme Court in *Mott* and which led to its erroneous ruling that has now been unconstitutionally applied to Petitioner's case. Exclusion for the latter purpose is encompassed by this Court's ruling in *Fischer,* whereas the former is directly prohibited by this Court's precedent as being in violation of due process.

**b) Arizona's prohibition of exculpatory evidence violates due process.**

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution Guarantees criminal

defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(quoting *California v. Trobetta*, 467 U.S. 479, 485 (1984)).

This Court has repeatedly held that the exclusion of competent and reliable exculpatory evidence by a state violates due process by infringing upon a defendant's fundamental right to defend the charges against him or her. *See e.g., Rock v. Arkansas*, 483 U.S. 44 (1987)(striking down state rule preventing defendant from testifying on issues previously the subject of hypnosis); *Crane v. Kentucky*, 476 U.S. 683 (1986)(reversing conviction that excluded evidence of circumstances surrounding confession); *Chambers*,, 410 U.S. at 299-302 (ordering new trial where court excluded adverse witness' out of court confession); *Washington v. Texas*, 388 U.S. 14, 22 (1967)(striking down statute that prohibited the testimony of defendant's alleged accomplice). Thus, the exclusion of rebuttal evidence may be contrary to due process when it has "infringed on the weighty interests of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

Whether the exclusion of such rebuttal evidence violates due process requires proof that admission of such evidence "was so deeply rooted at the time of the Fourteenth Amendment (or perhaps has become so deeply rooted since) as to be a fundamental principle which that Amendment enshrined."

*Egelhoff*, 518 U.S. at 48. While the introduction of evidence of intoxication was not so "deeply rooted" as to be circumscribed by due process in *Egelhoff*, the same is not true for the introduction of evidence to negate or rebut *mens rea*.

It is, of course, a foundation of criminal law and due process that the state must prove all the elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Several courts have squarely reached this issue and held that due process if violated when a state excludes diminished capacity evidence offered to rebut *mens rea* because it both infringes upon the right to defend oneself, the presumption of innocence and reduces the government's burden of proof. *See e.g., Hendershott v. People*, 653 P.2d 385, 391 (Colo. 1982) *cert. denied* 459 U.S. 1225 (1983); *People v. Whitler*, 214 Cal.Rptr. 610, n.1 (Ca.App. 1985). This conclusion is mandated by this Court's precedent.

> "When, however, an accused is precluded from controverting the prosecution's evidence on the element of *mens rea*, the jury's deliberative process on that element is limited to the single evidentiary consideration of whether the prosecution has met its constitutional burden of proof. Under such circumstances the issue of *mens rea* will be resolved solely on the basis of the jury's inference of this element from the prosecution's uncontestable evidence. An inference, the existence of which as a matter of law cannot be controverted, in practical effect becomes so compelling as to assume all of the features of a presumption. Such a *de facto* presumption of *mens rea* clashes head-on with 'the overriding presumption of

> innocence with which the law endows the accused and which extends to every element of the crime. . .' *Morrissette v. United States,* 342 U.S. at 75. [ ]; *Sandstrom v. Montana,* [442 U.S. 510, 520-24 (1979)]; *United States v. Gypsum,* 438 U.S. 422 [ ] (1978)."

*Hendershott,* 653 P.2d at 393 (additional citation omitted.)

In the instant matter the trial court, based upon the binding precedent of *Mott,* refused to consider whether as a result of Clark's paranoid schizophrenia the state had failed to prove that he "intentionally or knowingly" killed a police officer and was therefore not guilty of first degree murder. (R.T. 8/19/03 at 5-6.) It is submitted that both the trial court's decision and the *Mott* decision upon which it was based violated Petitioner's due process rights to present a complete defense, to the presumption of innocence and to proof beyond a reasonable doubt. This Court should grant the writ to remedy this violation of due process and clarify a state's power to preclude exculpatory mental infirmity evidence.

**c) Arizona's rule prohibiting exculpatory evidence to rebut *mens rea* is contrary to the overwhelming majority of federal and state authority.**

Arizona stands in the ever growing minority of jurisdictions that refuse to permit evidence of mental infirmity on the issue *mens rea.* The overwhelming majority of federal circuit courts have recognized the right of defendant to present this evidence as a defense to *mens rea. See., United*

*States v. Moran*, 937 F.2d 604 (4th Cir. 1991); *United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990); *United States v. Newman*, 889 F.2d 88 (6th Cir. 1989); *United States v. Brown*, 880 F.2d 1012 (9th Cir. 1988); *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988); *United States v. Poholt*, 827 F.2d 889 (3rd Cir. 1987); *United States v. McBride*, 786 F.2d 45 (2nd Cir. 1986). As best summarized by the Court of Appeals for the District of Columbia:

> "[E]xpert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime - even though he was aware that his act was wrongful and he was able to control it, and hence was not entitled to complete exoneration."

*United States v. Brawner*, 471 F.2d 969, 998 (D.C. Cir. 1972).

Similarly, the overwhelming majority of state courts permit introduction and consideration of this type of evidence. *See, State v. Joseph*, 590 S.E.2d 718 (W.V. 2003)(citing cases); *State v. Gracewski*, 767 A.2d 173 (Conn. 2001); *New Jersey v. Delibero*, 692 A.2d 981, 986 (N.J. 1997); *Penry v. State*, 903 S.W.2d 715, 768 (Tex.App. 1995)("Most of the state and federal courts recognize that evidence of diminished capacity is admissible to negate mental state."); *State v. Phelps*, 883 S.W.2d 138, 145, n.15 (citing 29 different state court decisions), 146 (Tenn.App. 1994)("Thus it is clear

that the vast majority of jurisdictions that have addressed the issue, allow evidence of a defendant's mental state to negate the existence of mens rea.; *See also,* Annot. *Mental or Emotional Condition as Diminishing Responsibility for Crime,* 22 A.L.R.3d 1228, 1238-40 (1968).

Additionally, both the ABA Criminal Justice Mental Health Standards, Standard 7-6.2 (1989) and the ALI Model Penal Code, § 4.02(1) provide that evidence concerning a defendant's mental condition should be admissible at a criminal trial whenever it is relevant to prove that a defendant did or did not have the sate of mind required for the offense charged. Arizona's blanket refusal to admit such evidence nearly stands alone in the field of criminal law. The writ should issue.

## CONCLUSION

Based upon the foregoing it is respectfully requested that this Court grant the writ of certiorari.

RESPECTFULLY SUBMITTED this 17th day of August, 2005

David Goldberg, Esq.
Attorney for Petitioner

# APPENDIX A

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED
JAN 25 2005
PHILIP G. URRY, CLERK
By

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | | |
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| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>ERIC MICHAEL CLARK,<br><br>Appellant. | ) | 1 CA-CR 03-0851<br>1 CA-CR 03-0985<br>(Consolidated)<br><br>DEPARTMENT D<br><br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)<br>**(Amended by Order filed 5-5-05)** |

Appeal from the Superior Court in Coconino County

Cause No. CR 2000-0538

The Honorable H. Jeffrey Coker, Judge

**AFFIRMED**

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Terry Goddard, Attorney General — Phoenix
By Randall M. Howe, Chief Counsel,
Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Flagstaff
Attorney for Appellant

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**S N O W**, Judge

**¶1** Eric Michael Clark, appeals from his conviction and sentence for first degree murder, a Class 1 felony. He argues: (1) that substantial evidence did not support his conviction for first degree murder; (2) that the court abused its discretion in finding that he had not proven, by clear and convincing evidence, that he

was insane at the time of the murder; (3) that Arizona Revised Statutes ("A.R.S.") section 13-502(A) (2000) violates the due process and equal protection clauses of the Arizona and United States Constitutions; and (4) that his sentence of life in prison without the possibility of parole for twenty-five years is disproportionate of the crime committed and therefore violates the Eighth Amendment interdiction against cruel and unusual punishment. For reasons set forth below, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 We view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the appellant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 In June 2000, a few weeks prior to the murder, Clark commented to some friends having a barbecue in a park in Flagstaff, Arizona, that he wanted to shoot police officers. One friend remembered him saying: "If I came up here with my .22 caliber hand pistol . . . and started firing off, when the police come, I will get them out of their cars and start -- I have rifles and I'll start shooting them in the head." That same friend recalled another instance a month or two before the shooting in which Clark made a comment that suggested that he was angry with police and "wanted to show them."

¶4 Sometime in the early morning of June 21, 2000, Clark went to his parents' house on University Heights Drive South and took the keys to his brother's green Toyota pickup truck. He then began driving around an adjacent neighborhood, blaring loud music from the radio and disturbing the residents. One resident estimated that Clark drove about twenty-two laps around the same block. He called the police to report it around the eighteenth lap.

¶5 Flagstaff Police Officer Jeffrey Moritz responded and located the pickup truck. It started "running from" him, and Moritz activated his emergency lights and made the stop. He informed dispatch that he was going to "be out with him," meaning the driver of the truck. Moments later Moritz radioed, "999[1], I've been hit. 999, I've been hit." Moritz then stumbled towards a nearby home, holding his chest and calling for help, until he collapsed on the ground. Clark abandoned the truck and took off on foot towards his house.

¶6 Residents heard two sets of gun shots: one a series of shots from Clark's .22 caliber handgun; the other, shots from Moritz's .40 caliber service weapon. One resident had also heard a strong voice give several commands to stay inside the vehicle shortly before hearing the shots.

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[1] This is the code for "officer needs assistance immediately."

¶7 Several officers converged on the scene based on Moritz's "999" call. Flagstaff Police Captain Brent Cooper, who lived nearby, also responded after he and his wife heard a police siren and gunfire. He was the first on the scene, arriving within "a couple of minutes" of hearing the gunshots. He found Moritz lying on the ground, twenty feet behind his police car, face up, with a small group of civilians around him. Moritz's service revolver was on the ground to the left of his body. When Cooper saw Moritz's face, he "was afraid he was gone then." All attempts to revive him proved futile.[2]

¶8 Moritz's police car was parked in the street a little behind the Toyota pickup truck. The police car's engine was still running and the overheard emergency lights were activated. The pickup truck's engine was off and its driver's side door was open.

¶9 Based on the truck's registration, police officers proceeded to Clark's parents' home on the adjacent block and set up a perimeter around the house. Clark was not found in the house, and his mother advised officers that he was "missing." At 9:00 p.m. on June 21, a Flagstaff police officer spotted Clark on a sidewalk on University Heights Drive, but Clark ran away with

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[2] The medical evidence at trial was that the blood supply to his brain would have been restricted as two of the four major vessels to the brain had been impaired by the trajectory of the bullet, which would have limited his ability to "mobilize and do much of anything physiologic" within two to four minutes of being shot.

several officers in pursuit. Police subsequently arrested Clark at gunpoint.

¶10 When he was arrested, Clark had gunshot residue on his hands. Police found the .22 caliber handgun Clark used to shoot Moritz in a yard in the vicinity of the shooting. The gun was inside a knit cap, and tests of the gun and the cap disclosed DNA that matched Clark's.

¶11 The state charged Clark with one count of first degree murder, for intentionally or knowingly killing a law enforcement officer who is in the line of duty. A.R.S. § 13-1105(3). The state did not seek the death penalty. On March 28, 2001, the trial court accepted the parties' stipulation that Clark was not competent to stand trial and committed Clark to the Arizona State Hospital for treatment. On May 8, 2003, the trial court found that Clark was competent to stand trial.[3]

¶12 Clark waived his right to a jury trial, and the matter was tried to the court. In addition to other theories, Clark's primary defense was that he was legally insane at time he shot Moritz.[4] At

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[3] The trial court specifically found that Clark was able to understand the nature of the charges, and that he could, "if he chooses, assist his attorney in his defense." The court further found that Clark's "status at this point in time is one of volition; in other words, he is choosing not to cooperate with his attorney at this time as opposed to being unable to."

[4] Defense counsel also argued that Clark was delusional and therefore did not know that Moritz was a police officer or that the shooting might have been the inadvertent result of a struggle over

(continued...)

the conclusion of the trial, the trial court rejected Clark's insanity defense and found him guilty of the first degree murder of Officer Moritz.

¶13 On October 2, 2003, the trial court sentenced Clark to life in prison without the possibility of release on any basis until he had served a minimum of twenty-five calendar years. Clark timely appealed. He also filed a motion to vacate the judgment, which the trial court denied. Clark then timely filed a supplemental notice of appeal from the denial of the motion to vacate judgment. Both matters were consolidated on appeal.

¶14 This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (1992), 13-4031 and 13-4033(A)(1) (2001).

**DISCUSSION**

(1) *Sufficiency of the Evidence*

¶15 Clark maintains that there was insufficient evidence to support his conviction for first degree murder of a police officer.[5] He rests this argument on his claim that the state presented only circumstantial evidence to show that he (1) intentionally or

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[4](...continued)
the weapon. He therefore asked the court to consider lesser included offenses of second degree murder and manslaughter.

[5] A.R.S. § 13-1105(A)(3) provides in relevant part that a person commits first degree murder if: "Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

knowingly caused a death and/or (2) that he intended or knew that he was killing a police officer. He therefore contends the trial court abused its discretion when it denied his motion for directed verdict.[6] We conclude that it did not.

¶16 We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). In so doing, we view the evidence in the light most favorable to supporting the verdict. *Id.* (citations omitted). This court "will not reverse a trial court's determination on grounds of insufficient evidence unless there is a complete absence of probative facts or where the judgement is contrary to substantial evidence in the record." *State v. West*, 173 Ariz. 602, 610, 845 P.2d 1097, 1105 (App. 1992) (citation omitted).

¶17 When reviewing the sufficiency of the evidence, we make no distinction between the probative value of direct and circumstantial evidence. *State v. Bible*, 175 Ariz. 549, 560 n. 1, 858 P.2d 1152, 1163 n. 1 (1993). "Evidence is sufficient if there is more than a scintilla of proof for a reasonable mind to support the conclusion." *West*, 173 Ariz. at 610, 845 P.2d at 1105 (citing *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984)).

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[6] Ariz. R. Evid. 20(a) provides in relevant part: "On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction."

"If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial." *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997) (quoting *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981)). The evidence at trial and reasonable inferences therefrom support the conclusion that Clark knowingly and intentionally shot Moritz and knew that he was a police officer when he did so.

¶18 The evidence at trial established that Clark was angry with police officers and fantasized about ways to retaliate or "show them," suggesting a motive for his actions. It also showed that, in driving the pickup truck with its radio blaring, Clark had engaged in behavior that would attract law enforcement to the neighborhood. Clark was playing a "rap CD" at the time that contained "many antisocial attitudes" and included lyrics expressing violent attitudes toward police officers.

¶19 Clark was armed with a .22 caliber handgun with which, according to medical evidence, he shot Moritz from a distance of "at least 2 to 2 and a half feet." The trial court was permitted to infer from Clark's use of the weapon that he intended or knew that he would kill Moritz. *State v. Herrera, Jr.*, 176 Ariz. 21, 30-31, 859 P.2d 131, 140-41 (1993). That inference is further supported by the fact that the bullet that killed Moritz entered his body at the back of his left armpit, which was consistent with Clark having

been "to [Moritz's] left and behind him" when he shot him. This permits the inference that Moritz was attempting to move away from Clark when he was shot.[7]

¶20 One witness testified that she first saw Moritz standing alone outside his vehicle and then saw him at the rear of his police vehicle and "almost immediate[ly]" heard "popping sounds" just before she saw him there. This would have been consistent with Moritz's having tried to take evasive action to avoid being shot. That same witness then saw Moritz go away from his police car, towards the spot where he ultimately collapsed, while a person that appeared to be a male, moving "at a real fast walk or a jog," went in the opposite direction, away from the green truck. Evidence of flight from or concealment of a crime usually constitutes an admission by conduct, and may permit the inference of a consciousness of guilt for the crime charged. *Bible*, 175 Ariz. at 592, 858 P.2d at 1195. All of this is sufficient evidence to support the inference that Clark intentionally or knowingly shot Moritz.[8]

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[7] In this regard, it is also noteworthy that Moritz shot with his left hand.

[8] Clark's theory at trial and on appeal is that Moritz and Clark may have been struggling over Clark's gun when it went off, however there is no evidence of this in the record. Clark bases this argument on the time that elapsed relevant to when Moritz got out of his car, when he was heard to command Clark to stay inside, and when the first gun shots were fired. However the radio transmission evidence shows that thirty seconds elapsed from the

(continued...)

¶21 Furthermore, there is sufficient evidence to support the inference that Clark knew that Moritz was a police officer when he shot him. Moritz was in full uniform and driving a fully equipped patrol car at the time. Witnesses testified that the police car's siren was activated at the stop and the emergency lights engaged. Although, it was early morning, it was already getting light outside. The fact that Clark pulled over in response to the siren and lights also indicates that he realized he was being stopped by a police officer.

¶22 Based on this evidence, we cannot say that the trial court abused its discretion in denying Clark's Rule 20 motion. *Sullivan*, 187 Ariz. at 603, 931 P.2d at 1113.

(2) *Determination that Clark was Not Insane*

¶23 Clark also argues that the trial court abused its discretion when it determined that he did not prove, by clear and convincing evidence, that he was legally insane at the time he shot Moritz. Our review of the record shows that it did not.

¶24 Section 13-502(A) provides that "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal

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[3](...continued)
time Moritz likely exited his car, after transmitting the license plate number, and radioed that he was "hit." Based on this evidence, Clark's theory that Moritz may have been recklessly shot during a struggle seems speculative at best.

act was wrong." Legal insanity is an affirmative defense that a defendant must prove by clear and convincing evidence. A.R.S. § 13-502(A), (C) (1996).

¶25 We review for abuse of discretion a trial court's finding that a defendant did not prove an insanity defense by clear and convincing evidence. *State v. Zmich*, 160 Ariz. 108, 111, 770 P.2d 776, 779 (1989). We view the evidence in the light most favorable to supporting the trial court's judgment and presume that the judgment is correct if there is any reasonable evidence in the record to sustain it. *State v. Veatch*, 132 Ariz. 394, 396, 646 P.2d 279, 281 (1982). Furthermore, we will not substitute our discretion for that exercised by the trial court. *Id.*

¶26 To prove an insanity defense, a defendant must establish, first, that he was suffering from a mental disease or defect and, second, that the mental disease or defect was of such severity that it rendered him unable to understand the wrongfulness of his conduct. A.R.S. § 13-502(A). Neither party disputed the fact that Clark was suffering from a mental disease, paranoid schizophrenia, at the time of the murder, and that he had suffered from it for quite some time.

¶27 The trial court agreed that Clark had proven that he was "afflicted with a mental disease or defect" at the time of the shooting, but found that he had failed to prove, by clear and convincing evidence, that this disease or defect prevented Clark

from knowing that shooting Moritz was wrong. In reaching its decision, the trial court specified that it had considered "the facts of the crime, the evaluations of the experts, the Defendant's actions and behavior both before and after the shooting and the observations of those that [sic] knew Eric." The trial court was justified in considering all of these factors and the evidence in the record supports its decision.

¶28 Clark's expert witness, Dr. Morenz, concluded that Clark's mental disease rendered him incapable of appreciating that his conduct was wrong. The State's expert, Dr. Moran, concluded that it did not. To the extent that the trial court may have accepted Dr. Moran's evaluation over Dr. Morenz's, it was entirely within the trial court's province to do so. As the trier of fact in this case, it was free to believe or disbelieve the testimony of either expert, *State v. Sanchez*, 117 Ariz. 369, 373, 573 P.2d 60, 64 (1977), and resolve any conflicts in the psychological testimony. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶29 In reaching its decision that Clark had not proven insanity, it also appears that the trial court gave significant consideration to Clark's own actions both before and after the shooting. For example, its judgment specifically noted Clark's actions in driving through residential neighborhoods with loud music "to attract law enforcement," as well as his behavior in evading capture before his arrest at gunpoint and in disposing of the murder

weapon afterwards. The mode of operation of the mind may be ascertainable from Clark's conduct; therefore Clark's conduct is admissible into evidence as it may indicate sanity or insanity or at least throw light one way or another on the issue. *See State v. Hurles*, 185 Ariz. 199, 205, 914 P.2d 1291, 1297 (1996) (quoting 2 Wigmore on Evidence § 228 (1979)). The trial court in this case correctly considered Clark's pre- and post-crime behavior in concluding that Clark had not proven insanity by a preponderance of the evidence.

¶30 "The rule is not what we would do if we were deciding the case, but whether or not we can say that the trial judge abused [his] discretion in reaching the conclusions [he] did." *Zmich*, 160 Ariz. at 111, 770 P.2d at 779 (citations omitted). Based on the evidence, we find no abuse of discretion in the trial court's determination that Clark did not prove by clear and convincing evidence that he was insane pursuant to A.R.S. § 13-502(A) at the time of the crime.

(3) *Constitutionality of A.R.S. § 13-502(A)*

¶31 At the beginning of the insanity phase of the trial, the trial court asked trial counsel to submit memoranda on the status of Arizona law regarding insanity so that it could "have a clear understanding of your relative positions" before the experts testified. In his memorandum, defense counsel argued that § 13-502(A) was unconstitutional because (1) it did not allow him to

present a "complete defense" under the *M'Naghten*[9] test for insanity to show that he could not appreciate the nature and quality of his acts; (2) it violated his due process by requiring him to prove insanity by clear and convincing evidence; and (3) it shifted the burden of proof to Clark on the specific element of intent.[10] The prosecutor's memorandum focused on our supreme court's decisions in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), and *State v. Casey*, 205 Ariz. 359, 71 P.3d 351 (2003), and the fact that "diminished capacity" is not a recognized defense in Arizona. The trial court concluded that it was bound by *Mott*, but nonetheless permitted Clark to present evidence concerning his ability to form the necessary intent to commit the crime.

¶32 At the end of his case, Clark moved again for a directed verdict, relying on his previous Rule 20 arguments "but now in consideration of all the evidence that's been presented." The trial court denied the motion.

¶33 After trial, Clark moved to vacate his conviction, arguing that: (1) the insanity statute violated due process; (2) the court's

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[9] The *M'Naghten* two-prong test for legal insanity provided that a person was not responsible for his criminal conduct by reason of insanity if at the time of the criminal conduct (1) the person was suffering from such a mental disease or defect as not to know the nature and quality of the act, or (2) if such a person did not know that what he was doing was wrong. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997).

[10] Defense counsel's memorandum noted that because it was preserving these arguments for the record, it did not request the State to respond.

failure to consider whether, due to his illness, he was unable to form the necessary *mens rea* to commit the offense deprived him of his fundamental right to present a defense; and (3) requiring him to prove insanity by clear and convincing evidence violated his due process rights and his right to equal protection.

¶34 He renews these arguments on appeal. We find them to be without merit.

¶35 We review a challenge to a statute's constitutionality *de novo* as a matter of law. *Casey*, 205 Ariz. at 362, ¶ 8, 71 P.3d at 354. "Statutes are presumed constitutional and the burden of proof is on the opponent of a statute to show that it infringes upon a constitutional guarantee or violates a constitutional principle." *Id.* at ¶ 11 (quoting *State v. Wagstaff*, 164 Ariz. 485, 494, 794 P.2d 118, 127 (1990)).

(a) *Due Process Violation*

¶36 Clark argues that A.R.S. § 13-502(A) violates due process because it does not incorporate the first prong of the *M'Naghten* insanity test, which would also permit him to establish that his mental disease or defect was such that it precluded him from knowing "the nature and quality of the act" he committed.

¶37 First, while the due process clause affords an incompetent defendant the right not to be tried, there is no constitutional requirement that a state recognize an insanity defense. *Medina v. California*, 505 U.S. 437, 449 (1992) (citing *Powell v. Texas*, 392

U.S. 514, 536-37 (1968)). Second, consistent with the general rule that both crimes and defenses are matters of state law, the United State's Supreme Court has recognized that individual states are free to recognize and define the insanity defense as they see fit. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). Clark therefore fails to prove how eliminating the first prong of the *M'Naghten* test establishes a violation of due process under either the Arizona or United States Constitutions.[11]

¶38 Moreover, as the Supreme Court has noted, the *M'Naghten* test for insanity turns on the finding of "criminal irresponsibility" at the time of the criminal offense. *Foucha v. Louisiana*, 504 U.S. 71, 97-99 (1992). It is difficult to imagine that a defendant who did not appreciate the "nature and quality" of the act he committed would reasonably be able to perceive that the act was "wrong." Therefore, we do not find that the language would add significantly to the test available in the statute. *See also State v. Chavez*, 143 Ariz. 238, 239, 693 P.2d 893, 894 (1984) (holding that jury instruction that erroneously omitted the language of the first prong of the *M'Naghten* test was not error because if the jury believed defendant did not know the nature of his acts it could not have found that he did not know their probable results).

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[11] "The federal and state due process clauses contain nearly identical language and protect the same interests." *Casey*, 205 Ariz. at 362, ¶ 11, 71 P.3d at 354.

(b) *Equal Protection Violation*

¶39 Clark also contends that A.R.S. § 13-502(A) violates his equal protection rights by requiring him to prove insanity by "clear and convincing evidence" when other affirmative defenses may be proven by a "preponderance of the evidence." *See* A.R.S. § 13-205(A).[12] This argument fails as well.

¶40 "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). "[I]f a law neither burdens a fundamental right nor targets a suspect class," reviewing courts will uphold the legislative classification as long as it bears a "rational relation to some legitimate [state] end." *Id.*

¶41 As we note above, the statutory provision concerning the insanity defense does not burden a fundamental constitutional right. *Medina*, 505 U.S. at 452-53; *see also State v. Bethel*, 66 P.3d 840, 841-44, 851 (Kan. 2003) (affirmative defense is creature of 19th Century and not so ingrained in legal system as to constitute fundamental principle of law). Nor does Clark establish that

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[12] This section provides: "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title."

defendants who propound an insanity defense are a suspect class. Therefore, Clark is not entitled to a strict scrutiny analysis.

¶42 Because insanity is an affirmative defense rather than an element of the crime, the Legislature may allocate to Clark the burden of proving it. *Cf.* State v. Farley, 199 Ariz. 542, 545, ¶ 14, 19 P.3d 1258, 1261 (App. 2001) (may allocate to defendant the burden of proving justification defense). The state has a rational interest in holding citizens responsible for their criminal conduct. Placing a higher burden on those who claim they are completely not responsible for their criminal conduct is a rational means of accomplishing that end. *See also State v. King*, 158 Ariz. 419, 421, 763 P.2d 239, 241 (1988) (rejecting due process and equal protection challenges to insanity statute).

(c) *Ability to Form Mens Rea*

¶43 Clark argues that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder. However, the record shows that the trial court did not prevent Clark from presenting such evidence, despite our supreme court's decision to the contrary in *Mott*, even going so far as to permit him to make an offer of proof on the issue at the close of the evidence.[13]

---

[13] The *mens rea* requirement for this crime was defined statutorily. A.R.S. § 13-1105(a)(3) ("A person commits first degree murder if . . . intending or knowing that the person's conduct will cause death to a law enforcement officer, the person (continued...)

¶44 Aside from the evidence offered to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer. Even assuming such evidence was sufficient, the trial court was bound by the supreme court's decision in *Mott*, which held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime."[14] 187 Ariz. at 541, 931 P.2d at 1051. Even assuming we agree with the dissent in *Mott*, we do not have the ability to disregard it as the controlling law in Arizona. *State v. Long*, 207 Ariz. 140, 145, ¶ 23, 83 P.3d 618, 623 (App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.").

¶45 Clark acknowledges that we are without authority to overrule *Mott*, but nonetheless argues that it was wrongly decided and should be overruled.[15] *See State v. Foster*, 199 Ariz. 39, 41,

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[13](...continued)
causes the death of a law enforcement officer who is in the line of duty.").

[14] *State v. McKeon*, 201 Ariz. 571, 38 P.3d 1236 (App. 2002), on which Clark relies, dealt with the issue of involuntary intoxication from the *non*-abusive use of prescription medications. It also acknowledges that *Mott* still controls on the insanity defense. *Id.* at 575, ¶ 20 n.2, 38 P.3d at 1240 n.2.

[15] He raises the issue for the purpose of preserving it for further appellate review.

¶ 9 n.1, 13 P.3d 781, 783 n.1 (App. 2000). We do not consider those arguments.

(4) Sentence Violates Eighth Amendment

**¶46** Finally, Clark maintains that his sentence to life without the possibility of release until he has served a minimum of twenty-five calendar years is disproportionate and violates the Eighth Amendment prohibition against cruel and unusual punishment. We find that it does not.

**¶47** We review *de novo* whether a penalty is unconstitutionally disproportionate to the crime. *See, e.g., In re One Residence at 319 E. Fairgrounds Dr.*, 205 Ariz. 403, 409, ¶ 20, 71 P.3d 930, 936 (App. 2003) (reviewing proportionality of punitive forfeiture). The proportionality analysis of a sentence requires us to compare the "gravity of the offense, understood to include not only the injury caused, but also the defendant's culpability, with the harshness of the penalty." *State v. Davolt*, 207 Ariz. 191, 215, ¶ 102, 84 P.3d 456, 480 (2004) (citations and quotations omitted). The mandatory nature of a sentence does not render it disproportionate. *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990).

**¶48** The first step in a proportionality analysis is to determine if an inference of gross disproportionality between Clark's crime and his sentence can be drawn. *State v. Davis*, 206 Ariz. 377, 384, ¶ 35, 79 P.3d 64, 71 (2003). Even given Clark's mental condition, we find in this case that it cannot. A life

sentence with the possibility of release after 25 years is simply not disproportionate to the crime of first degree murder. *See, e.g., Ewing v. California*, 538 U.S. 11, 20-31 (2003) (twenty-five year sentence for stealing golf clubs under "three strikes law" not constitutionally disproportionate sentence).

**CONCLUSION**

¶49 For the foregoing reasons, we affirm Clark's conviction and sentence.

G. Murray Snow
G. Murray Snow, Judge

**CONCURRING:**

Patricia K. Norris
Patricia K. Norris, Presiding Judge

Patrick Irvine
Patrick Irvine, Judge

# APPENDIX B

# Supreme Court

STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF THE COURT

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KATHLEEN E. KEMPLEY
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May 25, 2005

**RE: STATE OF ARIZONA v ERIC MICHAEL CLARK**
Arizona Supreme Court No. CR-05-0047-PR
Court of Appeals, Division One, Nos. 1 CA-CR 03-0851 and
1 CA-CR 03-0985 (Consolidated)
Coconino County Superior Court No. CR 2000-0538

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 24, 2005, in regard to the above-referenced cause:

**ORDERED: Appellant's Petition for Review = DENIED.**

Record returned to the Court of Appeals, Division One, Phoenix, this 25 day of May, 2005.

Noel K Dessaint, Clerk

TO:
Hon Terry Goddard, Arizona Attorney General
Attn: Randall M Howe, Michael O'Toole and Joseph T Maziarz
Goldberg, David Goldberg Attorney At Law
Eric Michael Clark, ADOC #180165, Arizona State Prison, Florence - Eyman Complex-SMU #1 Unit
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Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix

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# APPENDIX C

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | |
|---|---|
| STATE OF ARIZONA, Appellee, | 1 CA-CR 03-0831<br>1 CA-CR 03-0995<br>(Consolidated)<br><br>DEPARTMENT D |
| ERIC MICHAEL CLARK, Appellant. | Coconino County<br>Superior Court<br>No. CR 2000-0538<br><br>**ORDER** |

The court has received Appellant's Motion to Stay Issuance of Mandate Pending Petition for Writ of Certiorari. After consideration,

**IT IS ORDERED** granting the motion and issuance of the mandate is extended for a period of ninety days from the date of the Arizona Supreme Court denying review (May 25, 2005), in order for Appellant to file a Petition for Writ of Certiorari with the United States Supreme Court.

DATED this 10th day of June, 2005.

RESPONSE REQUESTED

2

SUPREME COURT, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

No. 05-5966

# IN THE
# SUPREME COURT OF THE UNITED STATES

ERIC MICHAEL CLARK,

PETITIONER,

VS.

STATE OF ARIZONA,

RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

## BRIEF IN OPPOSITION

TERRY GODDARD
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ATTORNEYS FOR RESPONDENT

## QUESTIONS PRESENTED FOR REVIEW

1. Assuming *arguendo* that the Due Process Clause requires the individual states to provide criminal defendants with an insanity defense, does it also require them to adopt the *M'Naghten* rule *in toto*?

2. Although the trial court expressed a preliminary opinion that evidence of a mental disease or defect was not admissible to negate Petitioner's *mens rea*, it allowed Petitioner to introduce evidence on this issue and make an offer of proof as to its admissibility. Despite the trial court's invitation, however, Petitioner did not make an offer of proof. Did Petitioner properly present his claim that he was barred from using evidence of a mental disease to negate his *mens rea*?

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## STATEMENT OF THE CASE

Petitioner was charged with first-degree murder for knowingly or intentionally killing a police officer acting in the line of duty. (Record on Appeal ["R.O.A."], Item 3.) Petitioner waived his right to a jury trial. (R.O.A., Item 324.) A bifurcated bench trial was held, with the guilt phase preceding the insanity phase. After the prosecution presented its evidence in the guilt phase, Petitioner moved for a directed verdict pursuant to Arizona Rule of Criminal Procedure 20. (R.T. 8/8/03, at 76–78.) Petitioner argued that there was insufficient evidence that he knew he was killing a police officer, and, thus, contended that the charge should be reduced to a lesser homicide. (*Id.*) The prosecutor, in response, pointed out that the victim was a fully uniformed police officer who was shot after he used his marked police cruiser to pull over Petitioner. (*Id.*) In reply, Petitioner stated that, after the completion of the defense case, he would be reasserting his argument that he did not have the requisite intent due to "his state of mind." (*Id.*)

Petitioner did not present any evidence in the guilt phase. (R.O.A., Item 373.) After the trial court denied Petitioner's motion for a directed verdict, Petitioner gave an opening argument relating to the insanity phase, stating: "[A]t the end of this case your [honor's] verdict is going to rest on whether [Petitioner] knew what he was doing was wrong." (Respondent's Appendix ["Resp. App."] A, at 4.) Petitioner did not argue that any of the evidence introduced at the insanity phase would affect his ability to form the *mens rea* to commit an intentional killing or to recognize that his victim was a police officer. (*Id.* at 4–24.)

Later in the day, the trial court requested the parties to prepare memoranda of law on some legal issues that had been raised during an unrecorded chambers conference. (*Id.* at 73–74; R.O.A., Item 373.) In his memorandum, Petitioner argued, *inter alia* that, under A.R.S. § 13-502, Arizona's

insanity statute, evidence of a mental disorder is relevant to negate the *mens rea* of a crime. (Resp. App. B.) Petitioner further argued that A.R.S. § 13–502 is unconstitutional because it: (1) does not allow him to argue that he was unable to appreciate the nature and quality of his actions; (2) requires him to carry the burden of proof by clear and convincing evidence; and (3) "shifts the burden of proof to [Petitioner] on the specific intent element of this crime." (*Id.*)

Addressing Petitioner's contention that evidence of a mental defect could be relevant to negate *mens rea*, the trial court expressed a preliminary opinion that an Arizona Supreme Court opinion barred such evidence.[1] (Resp. App. C, at 5–6.) The trial court, however, stated that it would not preclude Petitioner from introducing any evidence on this issue. (*Id.*) Rather, the court specifically stated that it would allow Petitioner "get all that stuff in" and allow him to "make an offer of proof" to preserve this issue. (*Id.*; see also R.O.A., Item 377.)

During the insanity phase, there was no testimony that Petitioner's mental state rendered him incapable of forming the intent to knowingly kill a police officer at the time of the offense. (App. D, at 12–121 [testimony of Petitioner's expert witness].) After the evidence in the insanity phase was concluded, Petitioner reasserted his motion for a directed verdict. (App. E, at 4.) Petitioner did not argue that a mental defect prevented him from forming the intent to knowingly kill a police officer. (*Id.*) During his closing argument on the issue of insanity, Petitioner again failed to make any argument, or cite any evidence, that would have rendered him incapable of forming the necessary intent for the crime of first-degree murder. (*Id.* at 4–29, 59–70.)

In a special verdict, the trial court first found that the prosecution had proven Petitioner's guilt beyond a reasonable doubt. (App. F, at 1–2.) The court then found that Petitioner had not met

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1 *State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997) (holding that expert testimony that defendant suffered from battered women's syndrome was inadmissible to show that she was incapable of forming the intent to commit child abuse).

his burden of establishing that he was insane at the time of the crime. (*Id.*, at 2–5.) In making this finding, the trial court noted that it had considered, among other things, the fact that Petitioner "was aware that Officer Moritz was a police officer." (*Id.*)

After Petitioner was sentenced, he filed a motion to vacate the judgment and sentence. (Resp. App. G.) As relevant to this instant petition, Petitioner argued that: (1) the Arizona insanity statute violates due process because it eliminates that "the nature and quality of the act" prong from the *M'Naghten* insanity test; and (2) the trial court's refusal to consider whether Petitioner's mental illness prevented him from forming the necessary intent for first-degree murder violated due process. (*Id.*) Again, Petitioner failed to make any argument, or cite any evidence, demonstrating that he had a mental defect or disease that would have prevented him from knowingly killing a police officer. (*Id.*) The trial court denied the motion finding that the motion was not "supported by the law as it exists in the State of Arizona at this time." (R.O.A., Item 424.)

The Arizona Court of Appeals affirmed Petitioner's convictions and sentence. (Petitioner's Appendix ["Pet. App."] A.) As relevant to this petition, the court found that Arizona's insanity statute did not violate due process because the individual states are "free to recognize and define the insanity defense as they see fit." (*Id.* at 15–16, ¶¶ 37–38.) Concerning the second issue in the petition, the court found that – contrary to Petitioner's contentions – the trial court did not stop Petitioner from presenting evidence that a mental disease or defect prevented him from forming the *mens rea* to commit first-degree murder. (*Id.* at 18–20, ¶¶ 43–45.) Also, the court stated that although the trial court permitted Petitioner to make an offer of proof at the end of the case, Petitioner specified no evidence "that demonstrated he was not capable of knowing he was killing a police officer." (*Id.*) Alternatively, the court found that evidence of a mental disorder to negate the

*mens rea* of an offense was not admissible in Arizona based on a prior decision of the Arizona Supreme Court. (*Id.*)

## REASONS FOR DENYING THE WRIT

### A. This Court's Precedents Leave No Doubt That The Individual States Are Not Required to Apply One, and Only One, Insanity Standard in Criminal Cases.

The Due Process Clause has very limited application in criminal law outside the specific guarantees of the Bill of Rights. *Medina v. California*, 505 U.S. 437, 443 (1992) (noting that the unrestrained use of the clause to review state criminal convictions would "invite undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order"). The States are given particularly wide latitude in defining the elements of offenses and defenses thereto. *See Patterson v. New York*, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.") (internal citation omitted); *Powell v. Texas*, 392 U.S. 514, 536 (1968) (noting that defining "*actus reus*, *mens rea*, insanity, mistake, justification, and duress [has] . . . always been thought to be the province of the States"). Given this deference to the states in this area, this Court has never held that an insanity defense is a fundamental right. *Medina v. California*, 505 U.S. 437, 449 (1992) ("[W]e have not said that the Constitution requires the States to recognize the insanity defense."); *see also Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring) (noting that the states are free to "determine whether, and to what extent, mental illness should excuse criminal behavior"); *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting) ("It is highly doubtful that due process requires a State

to make available an insanity defense to a criminal defendant."); *Despears v. Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995) (noting that states are "not constitutionally obligated to recognize a defense of insanity" and further noting that "several states have abolished the defense"). Accordingly, because the States are not required to provide criminal defendants *any* insanity defense, Petitioner's claim that he is entitled to a *particular* insanity defense necessarily fails at the outset.

Further, assuming *arguendo* that the Federal Constitution does require the individual states to provide an insanity defense, there is certainly no right to a particular insanity test. Rather, defining insanity is a task for the States:

> The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has *always* been thought to be the province of the States.

*Powell v. Texas*, 392 U.S. 514, 535–536 (1968) (emphasis added). Indeed, a constitutional rule for insanity would all but eliminate experimentation among the states in this area and "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Id.*, 392 U.S. at 536–37. Thus, "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536. Therefore, even if the states are required to provide an insanity defense to criminal defendants, this Court's prior decisions make clear that no one particular test is required.

Moreover, the *M'Naghten* test has often been referred to as the "right or wrong" test. *See e.g.*, *Powell*, 392 U.S. at 536 (referring to *M'Naghten* as the "the right-wrong test"); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 36, at 277 (1972) ("[I]n many jurisdictions the *M'Naghten* rule is stated merely in terms of the defendant's ability to distinguish right from wrong, and there is no mention of or instruction on knowledge of the nature and quality of the act."). Thus,

assuming *arguendo* due process requires the individual states to adopt the essence of the *M'Naghten* test—that a defendant know his actions are wrong—this Court should still not accept review of this case because Arizona's insanity statute incorporates this standard. A.R.S. § 13–502(A). *See Leland v. Oregon*, 343 U.S. 790, 800-01 (1952) (rejecting claim that Oregon's "right and wrong" test violated due process, noting that "[k]nowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions").

Finally, Petitioner contends that this issue impacts a number of states that have recently abolished the insanity defense. (Petition at 14.) Each of these states, however, utilizes a "*mens rea* approach" to insanity, which allows the defendant to introduce evidence of a mental disease or defect to negate the intent element of the crime. *See, e.g., State v. Bethel*, 275 Kan. 456, 66 P.3d 840 (Kan. 2003) (collecting cases and literature on the *mens rea* approach). Arizona does not utilize a *mens rea* approach to insanity. Accepting this case, therefore, would not resolve the issues relating to that approach. *See Glover v. United States*, 531 U.S. 198, 203 (2001) ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari."). Also, only one state court of last resort has found—over a vigorous dissent—that the constitution requires both prongs of *M'Naghten*. *Finger v. State*, 117 Nev. 548, 578, 27 P.3d 66, 86 (Nev. 2001). This decision was based in part on the state constitution. *See id.* at 551, 27 P.3d at 68 (finding that the state statute violated "the due process clauses of the United States and Nevada Constitutions"). Petitioner, therefore, has failed to demonstrate any significant jurisdictional conflict on this issue.

Thus, for all of the above reasons, Petitioner's first issue fails to present this Court with a substantial federal question.

**B. Petitioner's Second Issue Was Rejected On Independent and Adequate State Grounds.**

Petitioner contends that the trial court refused to consider evidence, that because of a mental

disease or defect, he was only guilty of a lesser homicide because he did not knowingly kill a police officer.[2] (Petition at 3.) The record of transcript Petitioner cites for this "refusal," however, demonstrates that the trial court did not prevent Petitioner from introducing *any* evidence on this issue. (Resp. App. C, at 5–6.) Rather, although the court expressed a preliminary opinion that such evidence was not relevant to Petitioner's *mens rea*, it allowed Petitioner to introduce evidence on this issue, encouraging him to make an offer of proof at the end of the trial:

> I'm going to let you go ahead and get all that stuff in because it goes to the insanity issue [as well] and because we're not in front of a jury. At the end, I'll let you make an offer of proof as to the intent, the *Mott*[3] issues, but I still think the supreme court decision [in *Mott*] is the law of the land in this state.

(*Id.* at 5.) The court added, "I will certainly allow you to preserve the issue; you can argue or not argue, but you can make an offer of proof at the conclusion of the case . . . ." (*Id.* at 6.) Petitioner, however, never made an offer of proof that he had a mental defect or disease that prevented him from knowingly killing a police officer. (Resp. App. E, at 4–29, 59–70.) Rather, Petitioner only argued that he was legally insane under Arizona law. (*Id.*)

Rejecting Petitioner's claim, the Arizona Court of Appeals found that the trial court did not prevent Petitioner from introducing evidence of a mental disease or defect that would negate his *mens rea*. (Pet. App. A, at 14, ¶ 31; 18, ¶ 43.) The court also found that Petitioner specified "no evidence in his offer of proof that demonstrated that he was not capable of knowing he was killing a police officer." (*Id.* at 19, ¶ 44.) Although the court of appeals used the term "offer of proof," the

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2 *See* A.R.S. § 13-1105(A)(3) ("A person commits first degree murder if . . . [i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.").

3 *State v. Mott*, 187 Ariz. 536, 540–45, 931 P.2d 1046, 1050–55 (1997) (holding that expert testimony regarding battered-woman syndrome was not admissible to show that defendant's mental capacity negated specific intent to commit child abuse).

court was necessarily referring to Petitioner's closing argument for the insanity phase of the trial—there was no separate "offer of proof." (See Resp. App. E, at 4–29, 59–70; see also App. I, at 20 [Petitioner's state-court reply brief conceding there was no offer of proof].) Thus, the reasoning of the court of appeals leaves no doubt that the primary basis for rejecting Petitioner's claim was waiver.[4] *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (noting that a state's court decision need not use any "particular language" in order to be based on independent and adequate grounds). This was an independent and adequate state ground for rejecting Petitioner's claim. *See Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (finding of waiver "amounted to an independent and adequate state procedural ground").

"[A]n adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment . . . ." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). Indeed, when a state law determination is sufficient to sustain a judgment, "any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). Further, because the burden is on the petitioner to establish jurisdiction, this Court has "regularly dismissed cases when the state judgment *might* have rested on an independent and adequate state ground." *South Dakota v. Neville*, 459 U.S. 553, 569 n.4 (1983) (original emphasis); *see also Durley v. Mayo*, 351 U.S. 277, 284–85 (1956) (finding that independent and adequate state grounds existed where order denying review was arguably inconclusive).

[4] *See State v. Gulbrandson*, 184 Ariz. 46, 59, 906 P.2d 579, 592 (1995) ("Defendant did not properly preserve this issue for appeal because his counsel failed to make an offer of proof" concerning the defense expert's testimony of the defendant's mental state of mind at the time of the offense.); *State v. Walton*, 159 Ariz. 571, 581–82, 769 P.2d 1017, 1027–28 (1989) (evidence concerning a witness's psychiatric history need not be admitted if "the defendant fails to make an offer of proof that the witness' perception or memory was affected by [a mental] illness"); *State v. Fendler*, 127 Ariz. 464, 477, 622 P.2d 23, 36 (App. 1980) (defendant's claim that he was precluded from introducing relevant evidence as to his intent "fail[ed] for lack of an adequate offer of proof").

Accordingly, because the court of appeals rejected Petitioner's claim on an independent and adequate state ground, this Court is without certiorari jurisdiction to review this issue.

## C. Petitioner's Second Issue Was Not Addressed By The Arizona Court of Appeals or Properly Presented to the State Courts.

### 1. *The court of appeals did not address the federal issue sought to be presented here.*

This Court will not consider a federal challenge to a state decision "unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson,* 520 U.S. 83, 86 (1997) (per curiam). The court of appeals' alternate basis for rejecting Petitioner's claim was that the evidence was barred by *Mott*, a state court opinion. (Pet. App. A. at 19, ¶¶ 44–45.) The court did not cite *any* federal law in rejecting the claim. (*Id.*) Further, while *Mott* rejected a due process claim, the decision is based principally on its interpretation of the Arizona criminal code, an issue of state law. *Mott*, 187 Ariz. at 540–45, 931 P.2d at 1050–55 ("Because *the legislature* has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent.") (emphasis added). The court of appeals reference to *Mott*, therefore, did not indicate that the court was deciding any federal issues. Nor is there any other indication in the court's memorandum decision indicating that it was deciding a federal issue when it rejected Petitioner's claim. (Pet. App. A at 18–20, ¶¶ 43–45.) In short, the Arizona Court of Appeals did not address the federal claim that Petitioner asks this Court to review.

### 2. *Petitioner has not met his burden of demonstrating that his federal claim was properly presented in the trial court and in the court of appeals.*

Because the court of appeals decision is silent on the federal question, it is presumed that the issue was not properly presented. *Adams*, 520 U.S. at 86. Petitioner bears the burden of defeating this presumption by affirmatively establishing that the state court had a fair opportunity to address

the federal question sought to be raised. *Id.*; *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Petitioner has not met this burden.

Petitioner filed a memorandum of law arguing that Arizona's insanity statute allowed him to introduce evidence of a mental disorder to "negate the *mens rea* element of a crime," *i.e.*, the specific intent the "killing [was] of a police officer." (App. B, at 2.) Petitioner's argument, however, was not premised on federal law—it was based solely on his reading of the state statute. (*Id.*) In addition to failing to provide a legal basis for a federal claim, Petitioner also failed to present a factual basis for his claim. In the guilt phase of the trial, Petitioner did not present any evidence—or request to present any evidence—that he had a mental defect or disease that would affect his ability to recognize his victim as a police officer in the guilt phase of the trial. (See, e.g., R.O.A., Item 373 [minute entry noting that, after the prosecution rested, the case proceeded directly to "Phase II"].) More importantly, despite the trial court's invitation to Petitioner to preserve the issue by making an offer of proof on this issue, Petitioner failed to do so. (Resp. App. C, at 5–6; Resp. App. E, 4–29, 59–70.) In sum, Petitioner failed to provide the trial court with a legal *or* a factual basis for a federal claim before the trial court rendered its verdict. *See, e.g., Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 247 (1988) (rejecting claim suspended bank officer was prevented from presenting evidence where "no offer of proof was ever made, and thus certainly was not rejected"); *Allen v. Hardy*, 478 U.S. 255, 257 (1986) ("Petitioner's failure at trial to make even an offer of proof [concerning the alleged improper use of peremptory challenges] constituted a procedural default for which petitioner had offered no excuse.").

In a motion to vacate the judgment and sentence, Petitioner alleged that the trial court's "failure to consider whether as a result of [his] mental illness he was unable to form the *mens rea* necessary to commit an intentional or knowing murder deprived him of his fundamental right to

contest the state's case, the right to present a complete defense and the right to a fair trial in violation [of] his rights to due process under the Fourteenth Amendment, U.S. Constitution . . . ." (Resp. App. G, at 1–2.) Petitioner's actual argument on this issue, however, is based primarily on state law. More specifically, Petitioner argued: (1) *Mott* is distinguishable from the instant case because it "was not dealing with the current formulation of Arizona's insanity statute"; (2) the Arizona legislature "unconstitutionally eliminated consideration of whether due to a mental disease a person is insane because they cannot formulate a specific required intent when it eliminated the first prong of the *M'Naghten* test"; and (3) *Mott* is distinguishable because insanity was not raised as a defense in that case. (*Id.* at 8–9.) These arguments do not raise the federal issue contained in the second question in Petitioner's petition because, to the extent that Petitioner attempted to raise a federal issue, he did so at too high a level of generality.

Petitioner *hinted* at a due process violation when he argued that *Mott* incorrectly applied federal law. (*Id.* at 9, citing *Montana v. Egelhoff*, 518 U.S. 37 (1996).)[5] *Egelhoff* sets forth the appropriate standard for determining the existence of a due process violation, *i.e.*, does the state's practice "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 43 (*citing Patterson*, 432 U.S. at 201–02). Petitioner, however, made no argument suggesting that he has a fundamental right to introduce evidence of a mental defect or disease to negate his intent. Although he claims that this evidence has been allowed in the past, the state-court decision he cites does not suggest that allowing evidence of insanity to the intent issue is *required* under the federal constitution. (*Id.* at 9, citing *State v. Korell*, 213 Mont.

5 Petitioner also cited *United States v. Fischer*, 328 U.S. 463 (1946). He did not, of course, contend that this case supported his position. *See id.* at 476 (trial court did not error in refusing to instruct jurors that they could consider the defendant's mental deficiencies in determining whether he acted in premeditation and with deliberation).

316, 329, 690 P.2d 992, 999 (Mont. 1984).) Likewise, the cases Petitioner cites from this Court do not concern the right to introduce evidence of insanity to negate *mens rea*. *See, e.g., Morissette v. United States*, 342 U.S. 246, 263 (1952) (holding that criminal intent is an essential element of the crime of knowing conversion of government property).

Finally, Petitioner cited to several state court decisions upholding the elimination of an insanity defense where a defendant is allowed to introduce evidence of a mental disease or defect to negate an element of an offense. *See, e.g., Bethel*, 275 Kan. at 473, 66 P.3d at 851 (agreeing with Montana, Idaho, and Utah, that "the affirmative insanity defense is a creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle of law"). These cases were simply not focused on whether due process *required* evidence of insanity to be admissible to negate *mens rea*. A federal claim is not properly presented where a litigant does nothing more than make passing references to the due process clause. *Adams*, 520 U.S. at 89 n.3 (finding due process claim not properly presented by "passing invocations of due process"); *Webb v. Webb*, 451 U.S. 493, 496–97 (1981) (even though state constitution did not have a full faith and credit provision, the use of the phrase "full faith and credit" did not properly present a federal claim). Thus, despite hinting that his claim was based on due process, Petitioner actually failed to make an argument that a defendant has the due process right to introduce evidence of insanity to negate the *mens rea* element of the crime.

Moreover, although Petitioner's post-verdict motion states that the trial court refused to consider evidence on this issue, the court stated that it was allowing Petitioner to "get all that stuff in," and, in fact, encouraged Petitioner to make an offer of proof as to how it was relevant to the issue of *mens rea*. (Resp. App. C., at 5–6.) Thus, as noted above, although the trial court expressed a preliminary opinion *Mott* controlled this issue, it did not refuse to consider any evidence. Rather,

Petitioner failed to properly present his *request* that evidence of his mental defect be considered in relation to the intent element of the crime. Also, Petitioner cited no evidence in his motion to vacate that would have prevented him knowing that: (1) he was shooting a gun; (2) shooting a gun can cause death; and (3) his victim was a police officer. (See Resp. App. F [trial court concluding that Petitioner "was aware that Officer Moritz was a police officer"].) Accordingly, in addition to failing to provide the trial court a *legal* basis for a federal claim, Petitioner's motion to vacate judgment also failed to provide a *factual* basis for such a claim. *See Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory*, 325 U.S. 450, 463 (1945) (declining to determine constitutionality of state law where there was "an inadequate factual basis for determining whether" the law applied to the litigants).

Further, Petitioner did not properly present this claim to the Arizona Court of Appeals. Although Petitioner made a passing reference to "due process," he did not invoke the due process clause of the Fourteenth Amendment to the United States Constitution in making his arguments. (Resp. App. H, at 46–51.) Indeed, the following subheadings to Petitioner's argument indicate that his claims are based on state law: (1) "The trial court's decision was contrary to Arizona law," (2) "*State v. Mott* does not apply to an insanity defense," and (3) "*State v. Mott* should be overruled." (*Id.* at 47–49.) The arguments themselves also fail to sufficiently state a federal claim. Under the first subheading, Petitioner cites one federal case, which holds, consistent with *Mott*, that there is no federal due process right to introduce evidence of insanity on the issue of *mens rea*. *Wong v. Money*, 142 F.3d 313, 323–25 (6th Cir. 1998). This case, therefore, does not raise Petitioner's claim—it refutes it. Petitioner's second argument on this issue cites no federal law at all. In his third argument, Petitioner posits that *Mott* misapplied federal law. (*Id.* at 49–52.) Petitioner, however, failed to make an affirmative argument that, under the federal constitution, a defendant has a due

process right to present evidence of insanity to rebut the *mens rea* for a crime—he merely claimed that such evidence has been allowed in the past and that many other jurisdictions still allow such evidence. (*Id.*) At bottom, therefore, Petitioner's argument was not one of constitutional dimension, but a plea to the Arizona courts to change state law.

Accordingly, for all these reasons, Petitioner failed to properly present his claims to the state court.

**3. *Petitioner's failure to properly present his claim prevented the state courts from making a reasoned decision on this issue.***

There are several reasons for requiring a claim presented to this Court to have either been addressed by, or properly presented to, the state courts, *i.e.*, the "not pressed or passed upon" rule. *Illinois v. Gates*, 462 U.S. 213, 221–22 (1983). First, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Id.* (citation and internal quotations omitted). In the instant case, there is no record as to what evidence, if any, Petitioner believes affected his ability to form *mens rea* for the crime. Also, by failing to make an offer of proof, Petitioner prevented the prosecution from contesting any such evidence. And, although the trial court stated its preliminary view that such evidence was not admissible, the record is devoid of any final ruling on this issue because of Petitioner's failure to preserve the record. *See Picard v. Connor*, 404 U.S. 270, 277 (1971) (noting that state court could not be faulted for not *sua sponte* addressing claims not properly made).

Further, given that the evidence at issue here was psychological in nature, a very specific offer of proof was required before an informed decision could be made as to the relevancy of the evidence. *See, e.g., Morgan v. Krenke*, 232 F.3d 562, 568–69 (7th Cir. 2000) (concluding that a due process violation did not exist based on the particular offer of proof of psychological evidence made in state court). Here, in order to demonstrate relevancy, Petitioner was required to make an offer of

proof of specific evidence that would have prevented him from knowingly killing another person or knowing that the person was a police officer. In his petition, Petitioner makes some general assertions that he was psychotic at the time of the killing and had delusions that some people were aliens. (See, e.g., Petition at 24, n.3.) There was no testimony at trial, however, that Petitioner's paranoid delusions rendered him incapable of intending to kill another person by shooting a gun at that person. Nor was there any evidence that Petitioner was unable to recognize his fully-uniformed victim as a police officer. Indeed, despite his paranoia and delusions, Petitioner was able to recognize his parents as his parents, even though he may have also believed at some level that they were "aliens." (Resp. App. D at 29, 42–43, 48, 55, 72–73, 92.) And, in fact, Petitioner's expert agreed that Petitioner never referred to police officers as "aliens." (*Id.* at 75.) At any rate, without a specific offer of proof, it is impossible to determine if Petitioner's mental health evidence was even relevant to his ability to form the necessary *mens rea*.

Moreover, the "not pressed or passed upon rule" acknowledges that state courts should be given an opportunity to consider alleged constitutional violations in the first instance. *Illinois v. Gates*, 462 U.S. 213, 221–22 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (noting that if an issue is properly presented, a state law "may be construed in a way which saves their constitutionality"). Here, if Petitioner had introduced evidence, *and* made an offer of proof, that a mental disease or defect affected his ability to form the *mens rea*, the trial court may have agreed with him that his case is distinguishable from *Mott*. Likewise, the Arizona appellate courts may have found *Mott* distinguishable if squarely presented with a different factual scenario. *See, e.g., Mott*, 187 Ariz. 536, 931 P.2d at 1057 (Zlaket, J., concurring) ("This case strikes me as an extremely poor vehicle for delivering sweeping pronouncements about the admissibility of expert psychological testimony in all criminal cases, yet I fear that is precisely what today's majority has

done."); *see also State v. McKeon*, 201 Ariz. 571, 575, ¶ 20 n.2, 38 P.3d 1236, 1240 (App. 2002) (distinguishing *Mott* and holding that a defendant is not precluded from asserting that "temporary intoxication arising from the non-abusive use of prescription medication to negate the requisite state of mind for a criminal act"). Thus, Petitioner's lack of an offer of proof prevented the Arizona appellate courts from determining whether the rule announced in *Mott* even applied in this case.

Accordingly, because the Arizona Court of Appeals did not pass upon the federal claim Petitioner seeks to raise in this Court, and because Petitioner did not properly present this claim in the Arizona courts, it is respectfully submitted that this Court does not have jurisdiction to review this claim under 28 U.S.C. § 1297(a). Further, even if jurisdiction is found to exist, the above arguments demonstrate that the Court should exercise its discretion to deny review. *See Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) ("[E]ven when jurisdiction exists it should not be exercised unless the case tenders the underlying constitutional issues in clean-cut and concrete form.") (citation and internal quotation omitted).

. . .

## CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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Chief Counsel
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Attorneys for RESPONDENT

CRM03-1175
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(12)

Supreme Court, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

No. 05-5966

# In The
# Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner,*

vs.

STATE OF ARIZONA,

*Respondent.*

**On Writ Of Certiorari To The Arizona Court Of Appeals**

## JOINT APPENDIX
## VOLUME I, PAGES 1 TO 104

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**Petition For Certiorari Filed August 17, 2005**
**Certiorari Granted December 5, 2005**

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IN THE SUPERIOR COURT*
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

| | | |
|---|---|---|
| STATE OF ARIZONA, Plaintiff, | ) | |
| vs. | ) | Case No. CR 2000-538 |
| ERIC MICHAEL CLARK, Defendant. | ) | |

REPORTER'S TRANSCRIPT
OF
BENCH TRIAL PROCEEDINGS
DAY 4

August 8, 2003
9:30 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

* * *

[77] Your Honor, just for the record, at this time we're moving on behalf of Mr. Clark for a directed verdict on the charge of first degree murder and essentially claiming that there has not been direct or circumstantial evidence presented at this point in the case to show that Eric Clark knew that Officer Moritz was actually a police officer and that he was actually intending to kill a police

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

officer at this point. And we would ask the Court to direct the verdict of not guilty on that charge and reduce the charge accordingly to manslaughter, based on the evidence before it. Thank you.

THE COURT: So, Counsel, you're moving on the basis of two grounds, that the State has failed to show that Mr. Clark knew that Officer Moritz was a police officer or that he intended to kill him?

MR. GOLDBERG: That he intended to kill specifically a police officer, yes.

THE COURT: Thank you. Counsel?

MR. POWELL: Judge, very briefly, there's been an abundance of evidence, we heard from independent witnesses that Officer Moritz was in a fully marked [78] squad car, he activated his overhead lights. At one point he had to put on his siren. The defendant did in fact comply and pull off the side of the road. Officer Moritz parked off center, like a police officer would. He exited the vehicle, was in full gear walking towards the Defendant. Once the shots were fired, we know that then Captain Cooper took approximately four minutes to arrive there and he said, from his car, and he wasn't all that close, he was able to see the victim there, he was able to look at his face and see he was in dire health, so there was plenty of light to see, Judge.

There's no way in the world that anyone would not have known this was a police officer. That was an intentional shot. There were numerous shots, it wasn't just one. There was no sign of struggle. Your Honor, we ask the motion be denied.

THE COURT: Thank you. Anything further, Mr. Goldberg?

MR. GOLDBERG: No, Your Honor. I just for the record wanted to reserve the right under the Rules allowed to reurge this motion at the completion of the defense case based on the evidence you hear on whether there is sufficient evidence that Eric Clark in his state of mind at that moment knew that this was a police officer and intended to kill a police officer.

[79] THE COURT: Thank you. I will take your motion under advisement. I want to have an opportunity to review the memoranda that has been submitted by the State.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

| | | |
|---|---|---|
| STATE OF ARIZONA,<br>Plaintiff,<br>vs.<br>ERIC MICHAEL CLARK,<br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>) | Case No. CR 2000-538 |

REPORTER'S TRANSCRIPT
OF
BENCH TRIAL PROCEEDINGS
DAY 5

August 12, 2003
9:45 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

* * *

PROCEEDINGS

[4] THE COURT: This is the time and date set in the continuation of the trial in the matter of State of Arizona versus Eric Clark, cause number 00-538. Let the record reflect the presence of the parties.

Counsel, I have researched the authorities, I have read the memoranda that's been supplied. At this time I'm going to deny the defendant's Rule 20 motion. At this point

in time, we will begin the phase of the trial which deals with the mental health of the defendant.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

| | | |
|---|---|---|
| STATE OF ARIZONA, Plaintiff, | ) | |
| vs. | ) | Case No. CR 2000-538 |
| ERIC MICHAEL CLARK, Defendant. | ) | |

REPORTER'S TRANSCRIPT
OF
BENCH TRIAL PROCEEDINGS
DAY 6

August 19, 2003
9:03 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

PROCEEDINGS

* * *

[5] THE COURT: Guys, I wanted to go on the record in the Clark case. I don't know if you want to have your client here. I was going to indicate where I want to go on this insanity issue, intent, the Mott case, that whole thing. I don't know whether you want to have your client here or not.

MR. MIDDLEBROOK: No. We can waive his appearance.

THE COURT: What I have intended or what I'm going to do after reading all the Mott case is – and recognizing that much of the evidence that you're going to be submitting, in fact all of it, as far as I know, Bryon, that has to do with the insanity could also arguably be made along the lines of the Mott issues as to form and intent and his capacity for the intent. I'm going to let you go ahead and get all that stuff in because it goes to the insanity issue and because we're not in front of a jury. At the end, I'll let you make an offer of proof as to the intent, the Mott issues, but I still think the supreme court decision is the law of the land in this state. The unpublished federal opinion, which gave a relief under writ of habeas corpus, I don't [6] think is the law of the land of the State of Arizona, but I will certainly allow you to preserve the issue; you can argue or not argue, but you can make an offer of proof at the conclusion of the case, but I don't think its the law of the land at this point. And then at least that preserves it on appeal if something happens later on down the road. But right now I'm bound by the supreme court decision in Mott and we will be focusing, as far as I'm concerned, strictly on the insanity defense.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

| | | |
|---|---|---|
| STATE OF ARIZONA,<br>Plaintiff,<br>vs.<br>ERIC MICHAEL CLARK,<br>Defendant. | ) | Case No. CR 2000-538 |

REPORTER'S TRANSCRIPT
OF
BENCH TRIAL PROCEEDINGS
DAY 9

August 22, 2003
8:58 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

* * *

[12] (Whereupon, the witness was duly sworn by the Clerk.)

DR. BARRY MORENZ

called as a witness herein, having first been duly sworn, was examined and testified as follows:

THE COURT: Sir, if you'll follow the bailiff around, he'll have you seated.

DIRECT EXAMINATION

BY MR. MIDDLEBROOK:

Q. Good morning, Dr. Morenz.

A. Good morning.

Q. Would you please tell us your name and spell your last name for us?

A. Yes. My name is Barry Morenz, it's M-o-r-e-n-z.

Q. How are you presently employed?

A. Um, I'm employed at the University of Arizona Department of Psychiatry, College of Medicine.

Q. And are you a psychiatrist?

A. I'm a psychiatrist, yes.

Q. Would you tell us a little bit about your [13] educational background that – about your educational background?

A. Yes. I graduated from Indiana University Medical School in 1978. I then came to the University of Arizona where I did one year of an internship and then three subsequent years of a psychiatric residency, which I completed in 1982.

Q What is a residency?

A. Residency in psychiatry is where you are working with psychiatric patients, wide variety of psychiatric patients in a wide variety of settings under the supervision of fully trained psychiatrists, professors at the medical school.

Q. And are you certified in any particular areas?

A. I'm certified by the American Board of Psychiatry Neurology in psychiatry, with added qualifications in forensic psychiatry.

Q. Do you also teach?

A. Yes. I teach at the medical school. My office is at the medical school. I teach supervised residents treating general psychiatric patients. I teach a course in interviewing. I teach a course in ethics and forensic psychiatry and a variety of other seminars that I give regularly.

Q. And then can you just tell us a little bit [14] about any type of professional organizations that you belong to?

A. I belong to the Pima County Medical Society. I belong to the American Psychiatric Association. The Arizona Psychiatric Association. I belong to the American Academy of Psychiatry and Law. I belong to the Association and Treatment of Sexual Abusers. Those are the main organizations I'm a member of.

Q. And then have you ever published any articles related to psychiatry?

A. Yes. I published articles related to jealousy, sex offenders, and ethics.

Q. And as to – you mentioned some other teaching engagement. Basically, do you teach other doctors about particular areas within your field?

A. Yes.

Q. Doctor, have you ever – have you ever worked in the area of evaluating defendants for insanity?

A. Yes, I have.

Q. Before we get there, I'd like to back up a little and ask about your clinical experience with patients. What do you do as a psychiatrist with patients?

A. You mean currently?

Q. Correct.

[15] A. Well, I have a number of general psychiatric patients that I see myself. I supervise residents who are treating patients in an outpatient setting in our emergency room and in our inpatient unit. So I have contact with a variety of patients in – both with minor psychiatric problems and very severe psychiatric problems.

Q. And then in the forensic setting, have you ever been qualified as an expert in federal or state court?

A. Yes, I have.

Q. Okay. As it relates to the definition of insanity under A.R.S. 13-502, have you conducted evaluations as it relates to that statute?

A. Yes. I have conducted many evaluations as it relates to the determination of legal insanity in Arizona.

Q. And can you tell us whether you're typically hired by the state? Typically hired by the defense?

A. Um, I have been hired by both and appointed by the court. And, you know, the percentages sort of vary from year to year, but overall it's probably been roughly even split.

Q. Okay. And then can you tell us on a day-to-day basis kind of what's – what the split would [16] be between

your forensic work that you do for the courts and your clinical practice?

A. I would say roughly about 50 to 60 percent is forensic work, about 20 to 25 percent is teaching of one form or another, and then another 20, 25 percent is more clearly clinical work.

Q. Would you tell us what your understanding of insanity is in the State of Arizona?

A. Um, in Arizona insanity is defined by an individual who, at the time they committed the act, were suffering from a mental disease or defect such that they did not know that the acts they committed were wrong.

Q. Doctor, if I ask you for an opinion in this case, would you agree with me that your opinions will be based upon facts and data or interviews or observations that are reasonably relied upon in your field?

A. Yes.

Q. And, also, if I'm asking for an opinion, would you agree to limit your opinion, unless you tell us whether you're speculating or not, to express your opinion within a reasonable degree of medical probability?

A. Yes.

Q. Doctor, I'd like to talk a little bit about the mental disorders of schizophrenia. First of all, how [17] would you define schizophrenia?

A. Schizophrenia is deterioration or disintegration in individual's emotional and psychological functioning. It's a pretty profound disorder with profound consequences for the individual that's afflicted. There's many different

symptoms that are manifested in that individual with schizophrenia, everything from delusional beliefs, hallucinations, to cognitive deterioration, an inability to just process information to, say, pass courses in the way that an individual had been able to prior to the onset of illness.

Schizophrenia's onset is usually in adolescence, early adulthood, and can be progressive and can become worse over time; although, that's not always the case.

Q. Within the research in your field, has there ever been a way to determine the organic cause of schizophrenia?

A. No.

Q. Is there a – within schizophrenia, is there a distinction made between a psychosis and a delusion?

A. Well, a psychosis is a general term that describes an individual who has gross disturbance in their reality testing and, usually, that's manifested by [18] a combination of delusions and hallucinations.

Q. So when we talk about – for example, if I were to ask you the question about whether Eric was psychotic, we – we're really talking about a constellation of, instead of delusion being a more specific symptom?

A. Yes.

Q. What is a delusion?

A. A delusion is a false belief, not based in reality.

Q. And are there different types of delusions?

A. Oh, sure. There's paranoid delusions and there's grandiose delusions, which are among the more common;

paranoid delusions simply being fear that the CIA is trying to kill me, or grandiose delusions, belief that I'm Jesus Christ.

Q. And then there are – and within the medical field do they make a distinction between bizarre and nonbizarre delusions?

A. Ah, yes.

Q. And what is the distinction between those two?

A. Um, well, a bizarre delusion would be a delusion such as Eric Clark has demonstrated a belief in aliens and it's just totally preposterous. And, you know, a less bizarre delusion, sometimes we see with [19] people who have become extremely depressed and are often, you know, very suicidal. They feel very hopeless. They may develop delusional beliefs about their future and their hopelessness that isn't – you know, there's no aliens, there's no CIA out to get them, yet, still, they're so depressed that their understanding of – about their future and about their place in the world is – is very distorted and delusional.

Q. When you were talking about cognitive impairments that a schizophrenic may suffer, how is that manifested?

A. Well, a good example is with Eric Clark. In 5th, 6th, 7th grade, he had took Stanford 9 tests and he did, you know, at or above grade level. By the time he was in the 10th grade, his Stanford 9 tests had diminished to the point where he was now functioning at below grade level. And that kind of cognitive deterioration can be seen as an early sign of schizophrenia.

Q. Do schizophrenics have problems performing complex tasks?

A. Schizophrenics often become unable to perform complex tasks that we take for granted. That often forms the basis of their difficulty in working, in attending school. They just cannot manage to manage a routine. [20] They can't handle the demands of classroom work. They can't handle the demands of a job at a complex industrial society.

Q. Is there different subtypes of schizophrenia?

A. Yes. There's several subtypes.

Q. Okay. And how are those – I don't need to go blow by blow through each subtype, but are they categorized by a certain constellation of symptoms?

A. Yeah. They're sort of different flavors or colors, if you will, of this schizophrenic process.

Q. Okay. And can you just tell us what some of the general subtypes are?

A. Paranoid, catatonic, disorganized and undifferentiated.

Q. The paranoid type, what is the – what's the identifying constellation of symptoms within that subtitle?

A. The – the identifying symptoms are the presence of delusions, usually paranoid and grandiose delusions, and often hallucinations, as well.

Q. The DSM-IV – what is DSM-IV?

A. Ah, the DSM-IV is the diagnostic and statistical manual of mental disorders. The fourth edition, it is

actually a text revision edition revision as well now, and it's a compendium of different [21] psychiatric diagnoses with the criteria that make up those diagnoses. So it's really just a textbook that guides clinicians in diagnosing various mental illnesses. And there is practically a checklist for each of the different disorders so if you have, you know, the required items in the check list, then you meet the criteria for that diagnoses.

Q. So if we wanted to, we could go through the DSM-IV, look at schizophrenia, look at paranoid subtype and see within it the various symptoms that are – that are indicated there as a guideline for making that type of diagnosis?

A. Yes.

Q. Is the paranoid type schizophrenia characterized by any form of disturbed thinking?

A. Well, all types of schizophrenia are characterized by a variety of forms of distorted thinking. And, you know, common among people with schizophrenia is a disturbance in logic; their, you know, thinking really doesn't make a whole lot of sense. It's not connected. One thought is not connected well with another thought. If you read schizophrenic writing it may sort of make sense but, you know, you keep trying to understand the meaning, it often just is not there. You can't grasp what they're trying to communicate. Their [22] communication is often very idiosyncratic. They use a kind of prophet logic that other people don't share. And that makes their thinking, you know, very disordered, very disturbed, very hard to understand.

Q. Do schizophrens have difficulty distinguishing between their internal reality and external reality?

A. Yes. Schizophrenics do not distinguish very well between sort of their own internal world, where their world stops, someone else's begins and, you know, how they fit into an external reality. And one of the things that you can see sometimes with schizophrenics and you see with – you saw with Eric Clark is when his symptoms were particularly severe, he was clinging to his mother, things like holding her hand and putting his arm around her, which was probably an effort on his part to grab onto, in a physical but also a psychological sense, his mother's reality because his reality was disintegrating. Psychiatrists talk about the need with schizophrenic patients to lend them your own ego, kind of give them some structure that they can structure their own world with, because they can't do it very well. So that's – that's this internal and external reality, they kind of merge with other people and with the environment, and they can't sort of tell the difference between, you know, where they end and others in the environment begin.

[23] Q. Is another possible example of that where in your interview with Eric and your discussing about what type of plea is occurring, that when he just references me, says, I'm just going to do what Bryon wants me to do, is that another reference to that grasping on or just going along as opposed to having an independent ego?

A. Yes. Absolutely.

Q. People who suffer from schizophrenia, is it required that they have some type of command hallucination in their image?

A. No. To diagnose a schizophrenia – paranoid schizophrenia, all you need is bizarre delusions in addition to psychosocial decline.

Q. And I'd just like to clarify, when I use the words, command hallucinations, what does that mean to you?

A. A command hallucination – first, an hallucination is a sensory perception without any kind of sensory stimulus. The most common in schizophrenics are auditory hallucinations where the individual hears a voice talking to them and they don't know where it's coming from and there is no one talking to them, there is no sensory stimulus there, so that's the hallucination. And that kind of command, the command hallucination, is where an individual experiences a voice or force or a [24] power that communicates with them, talks to them, and tells them, commands them what to do.

Q. And that's not required in order to be a schizophrenic or to have a diagnosis of schizophrenia?

A. No.

Q. Does a schizophrenic's social habits start to deteriorate or deteriorate?

A. Yes. That's – that's really required for the diagnosis of schizophrenia, that you see a decline in an individual's social habits.

Q. Would an example of that be, for example, leaving the bathroom door open while you urinate or defecate in the family room?

A. Yes. Other examples being not bathing, not taking care of one's appearance, dressing oddly. Eric Clark would wear multiple layers of clothes. That's another example of just decline in basic social habits.

Q. People suffering the paranoid type of schizophrenia, do they often have delusions about the world ending, that type of thing?

A. Yes. The delusion of an apocalyptic event is very common with paranoids.

Q. And then you've been practicing as a psychiatrist for over 20 years. Has there been a shift, so to speak, in the types of delusions you see [25] schizophrenics suffer?

A. Yes. It – you know, 20 years ago, some of you still remember, that was the year of the cold war, so there was often a lot of delusions about the CIA, KGB, this kind of thing, or religious delusions were more common. Now more common delusions have to do with aliens, like Eric Clark's delusions.

Q. And when you look at a group of people that are schizophrenics, why do you see the shift of types of delusions?

A. It's just the delusions to some degree reflect what may be transpiring in the culture at that point in time, what popular themes are. Certainly over the past few years there have been many movies, and especially around the time of Y2K there was a lot of speculation and beliefs about aliens.

Q. Is – are schizophrenics – do they have difficulty with their sensitivity to critical or rejection-type situations?

A. Yes. Schizophrenics become exquisitely sensitive and to trivial forms of rejection that most people wouldn't even notice. They really misinterpret these kinds of social cues and often react very dramatically. One example is a

woman who was – who prepared a dinner for some friends. She was [26] schizophrenic. The friends came. It was a very nice dinner. They really, you know, insisted on helping clean up. And as they moved in the kitchen and were cleaning everything up, she became extremely upset with them, you know, threw them out of the house, yelling at them. And when her psychiatrist talked to her later, the problem was that she thought that – that they didn't think that she could organize her life very well, so they were going to organize it for her. And it made no sense, but that was her kind of sensitivity to what she perceived as rejection and criticism.

Q. And is there also examples where a schizophrenic overreacts to such trivial things as not being allowed to watch a certain TV program?

A. Yes. An example of that was a young schizophrenic wasn't allowed by his father to watch a TV program and he quickly killed his father, you know, just, you know, out of the blue, totally without any warning at all.

Q. In that regard, Doctor, can you predict as a medical doctor – or as a psychiatrist, the types of responses schizophrenics are going to have to a particular situation?

A. No. It's – it's especially difficult with schizophrenics to predict what they will do next or how [27] they will think next. Um, they can – they can develop beliefs fairly quickly, fairly dramatically, through inconsequential kinds of events, you know, seeing, you know, someone walk across the street may all of a sudden, you know, they feel that that has special significances, has told them that this means that, you know, the end of the world is coming, you know, in two weeks, some other kind of meaning, and, you

know, it just came out of the blue, you know, and you ask them, well, how do you know that? I just know. It's not based on logic, it's not based on the shared kind of understanding we have of the world. It's their own idiosyncratic logic.

Q. And, actually, that's what I was going to get into next, is oftentimes, especially as a forensic psychiatrist, you're looking at a particular schizophrenic's behaviors. Is there any form of rationality you can place as to their thinking?

A. No. Often it's just – we attempt to try to make some kind of sense, and there are threads sometimes that you can pull together from what schizophrenics say to develop some kind of communication with them. You know, it's been said that you have to learn to talk schizophrenese, kind of another language, and that can enable some – some bonding with a schizophrenic patient, it can enable you to help them somewhat. But, really, [28] ultimately, their thinking, their beliefs, do not make sense. They're irrational. They're illogical.

Q. I just want to stay with these delusions just a little bit longer. Are delusions – when you're looking at a schizophrenic and their delusions, are these something that, for example, a particular delusion will have a long period, a slow, what I would call, incubation period, or is it something that can happen very suddenly?

A. It can happen all of a sudden, and it can also kind of gradually grow. You know, it can start suddenly and then get elaborated on, in weeks and months, and then change to something else. It's very hard to keep track.

Q. There is no rhyme or reason to it?

A. There often is no rhyme or reason.

Q. With schizophrenics and their delusions, these false beliefs that they hold, is there any way to correct them with logic through their thinking?

A. No. The conversation that I had with Eric shortly before this was, you know, fairly bizarre, talking a little bit about what had happened in court and, you know, his understanding and what may be transpiring. And it just – just didn't make a whole lot of sense and I wasn't about –

Q. I'm saying – you're talking about your interview with him this morning?

[29] A. Yes. And I – I was not going to talk him out of his beliefs in any way.

Q. Would an example of that be where he believes his mother is an alien and apparently still believes his mother is an alien?

A. Yes. He still believes that there are 50,000 aliens in Flagstaff. What has changed is he doesn't feel that they're as malevolent as he used to believe. That seems to be a change. And why that's taking place is not completely clear.

Q. Is it possible that the Haldol that he's been on for nearly eight months now may have had some affect on that?

A. I think that that's had an impact on just making the delusion have less power in his mind. It's still there, but it's like less important, it's receded to the background somewhat.

Q. When we're talking about a schizophrenic's abilities to communicate verbally, is there any particular concerns there you have as a forensic – or excuse me – as a psychiatrist?

A. Um, schizophrenics' language is often used more in the service of self-expression of some form instead of an attempt to communicate, make contact, develop a relationship with another person. And I think [30] an example of Eric's language difficulties is his interest in studying Chinese. That may be something that's important to him in a form of self-expression, but in no way is that going to help him communicate with his family, with the staff at the hospital, or his attorneys or any friends that he's going to meet. You know, his ability to really make that form of contact, that kind of relationship, that kind of communication, is very impaired.

Q. I have to talk to you about drug use among schizophrenics because that's been a dominant issue in this trial to some degree. What do you see – excuse me. Do you see that as an issue when you're treating or when you're dealing with schizophrenics?

A. Today it's very common with schizophrenics to use drugs, often marijuana and alcohol. Those are the common ones. And the drug use is problematic. They use the drugs, initially, they find that the sedating effects help quell, help diminish some of their symptoms, but in the long run, as they continue to use the alcohol and the marijuana, it only makes their condition worse. It exacerbates it. So it's sort of a mixed picture for them, they feel some benefits temporarily but probably overall it's just hurting them.

Q. Do they understand that?

[31] A. No, they don't understand that. And you're underscoring a really important point. And it continues to be the case with Mr. Clark, he doesn't believe that he has any kind of illness or any kind of difficulty. And he reiterated that to me this morning when I was talking to him. He, you know, says, well, you know, I know I have, you know, these beliefs in aliens, you know, and they – we – they have not talked a lot about that in court. And I said, well, I'm going to talk about that. And he said, well, I think Bryon will be happy that you're talking about it but, you know, I'm – you know, I don't care if you do or not.

Q. And is that also another example of that with Eric is that he does not like the antipsychotic medications that he's been on?

A. We talked about the medications and he doesn't want to take the medications. He doesn't want to take any medications. He believes that it's poisoning him. We had quite a little conversation about taking Cogentin, which can combat the side effects of the Haldol. And, you know, he is a little stiff. He's feeling some of the side effects of the Haldol. And I said, well, the Cogentin could really help. And he says, well, I know, but I think it really – it really – I just – it wasn't logical. He just sort of, well, I don't want to take it [32] because it's poison and the Haldol is poison and it makes me in my thinking worse. And he just doesn't see that he has any problems that he needs any treatment for.

Q. I'd like to turn now to the issue of violence and its predictability among schizophrenics. First of all, I'd like to talk about a particular area of violence, suicide. Is that an issue among schizophrenics?

A. Yes. Suicide is a very common problem with schizophrenics. It's estimated that within 10 years of the onset of illness, 10 percent of schizophrenics will commit suicide. 40 percent attempt suicide. I mean, it's a really, really severe problem. And it's a problem that can happen precipitously, you know, the person is sort of managing and then all of a sudden kills themselves, you know, whether it's in response to a belief that – for instance, a common belief among schizophrenics is that their parents are not really their parents or that their – you know, they were adopted, or in Eric's case, that his mother is an alien. And, again, this kind of goes back to probably a deep-seated belief that they're being rejected by their parents and others, as well.

Q. And they respond very quickly?

A. I mean, the suicide can be just sort of one [33] moment, you know, they're – they seem fine, they're placid, they're, you know, seemingly very comfortable, and the next minute they have jumped out the window.

Q. Is there any discussions amongst psychiatrists as to why suddenly they do these things as far as, for example, command hallucinations, telling them to do it?

A. Command hallucinations can, but that's probably not the major driving force. It is hard to understand, other than these are individuals who are extremely troubled. They do not experience much pleasure in the world, if any. Their worlds are chaotic, confusing, frightening. And Eric is a wonderful example. I mean, after he was arrested, he was – in the transcript of the statements he made when he was in the jail, he just kept saying, take me to heaven, take me to heaven, you know, I don't want to be poisoned anymore. End this torment. And he had made those same

kinds of comments to his mother in the months and, you know, maybe as much as a year or more prior to his arrest for the killing of the policeman.

Q. Words to the effect – I think his school counselor said words to the effect of, I can't take it anymore?

A. Right. And his mother was appropriately very, very concerned about this, fearing that he would kill [34] himself. They found him with a gun at one point and were very worried that he would hurt himself. They were worried that he might hurt some member of the family. They became frightened of him.

Q. Are schizophrenic patients typically more violent?

A. Yes, schizophrenic patients are more violent than the general population.

Q. And the paranoid type?

A. Especially of the paranoid type with active delusions or hallucinations.

Q. Do – are command hallucinations, do they play an important role in the onset of violence or in a violent – or in the occurrence of a violent act?

A. They can, but that's not either necessary and does not even occur probably in the majority of cases.

Q. Are there examples where an inpatient in an inpatient setting where one patient attacks another without the command hallucination?

A. Yes. And probably, you know, what happened to Eric from his roommate was an example of some – something that the other patient perceived Eric to do, either

was somehow malevolent, was somehow rejecting of this other patient and the patient came up and scratched him with some kind of metal item across the face. He [35] still has a scar from that. And that came totally out of the blue, had given no indication that he had any problem with Eric or said anything to Eric that, you know, why did you say that or what did you do this for? No one had any idea that he would do that.

Q. In that regard, when we're talking about the symptoms of schizophrenia and their manifestations through behaviors or through voices or whatever, are there usually clear warnings that a violent act is going to occur?

A. No. The violent act may come just without any warning whatsoever. Another example we talked about is a schizophrenic patient is being treated by a general physician, he kept going in and talking about, you know, various problems and the physician did a workup and, you're fine. There's nothing wrong. You don't need to come back here. The patient left and a few hours later killed the doctor. You know, just – how could anyone predict that?

Q. Okay. Let me ask you this, Doctor: Based on your review of the records, your interviews, your observations of Eric, did – has he exhibited many of these signs and symptoms we have discussed so far?

A. He's exhibited virtually all of the signs and symptoms we've discussed.

[36] Q. Based on your review of the records, your observations, your training, your experience, is it highly probable that Eric, as a result of a mental disease, was insane at the time of the shooting?

A. Yes.

Q. Let's talk about what's led you to that – to that opinion. First, let's talk a little bit about the basis of your opinion. What did you use to formulate your opinion?

A. Your Honor, I reviewed fairly extensive documents from the state hospital, from Maricopa County Jail, Coconino County Jail, some of the police reports, both for the time in 2000, as well as some of the instances before that, where he was arrested, I reviewed the videotape and a transcript of when – of the night he was arrested, I reviewed photographs of his room, I reviewed many witness statements, I reviewed many psychological and psychiatric evaluations that have been done, I have interviewed Mr. Clark, I interviewed his mother, I reviewed all of that material in coming to my conclusion.

Q. What are some of the significant facts that you relied on in coming – first of all, let me ask you this: Based on your training and experience and the information that's been made available to you, do you [37] have an opinion as to whether Eric does suffer from a mental disease or defect?

A. Yes. I believe that he suffers from paranoid schizophrenia. I believe it's been present continuously probably from around, you know – the first symptoms were probably present in early 1999 and they gradually grew more pronounced and, you know – and still are pretty severe; although, they're a little less severe now with the Haldol that he is taking.

Q. As far as a indicator of outcome when the schizophrenic symptoms onset earlier versus later in life, is there a distinction – I mean, is there a predictability of outcome?

A. Earlier usually has the worse prognosis.

Q. And why is that?

A. No one fully understands.

Q. In – in your review of the records, your interviews, the information that's been made available to you, did you consider an issue of malingering?

A. Yes.

Q. And did you rule that out?

A. Yes, I did.

Q. Let's talk about some of the facts that you or observations that you've made as you've looked through these records and talked with Eric and talked with his [38] parents that were significant to you in formulating your opinion that Eric is paranoid schizophrenic.

A. Okay.

Q. You've authored a report, I believe – you've authored several reports, but the one in particular dated July the 12th, 2003, do you have that in front of you?

A. Yes.

MR. MIDDLEBROOK: Judge, that's also in the defense exhibit notebook, if at times you'd like to follow along with that.

THE COURT: Which exhibit is that?

MR. MIDDLEBROOK: Should be Exhibit 5A.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: First of all, what's the significance of taking a history or developing a history in a case like this?

A. Well, its crucial to understand the evolution of the individual's problem and problems.

Q. Okay. Did Eric suffer from a psychosis of any type prior to the shooting?

A. Yes. I believe that he was very psychotic for months, if not over a year, prior to the shooting.

Q. And can you give us examples of that?

A. Um, I think that the – probably one of the better examples is his continual reference to his mom [39] periodically that they are after him; his references and actions based on these beliefs that the water in his house was being poisoned; that the food was being poisoned, those are also evidence of delusional beliefs, evidence of psychosis; his statements that he made about, um, that a rap star was going to talk to him and somehow he was going to become president, you know, evidence of a grandiose delusion; and then his discussions at times asking his mom if she was really his mom or were they aliens, again, evidence of delusional beliefs; and then his behaviors around the time that he's experiencing these delusional beliefs, washing of the clothes, the – the turning on of water in the house, the shutting the blinds, the turning of volume up on all of the TVs and radios, which, by the way, I think probably was evidence that he was experiencing auditory hallucinations and that this turning up of all the volume, which schizophrenics often describe, is an attempt to drown out the voices that they are experiencing. I don't

know that for sure. He's never admitted to these hallucinations, but I'm still suspicious that that was going on.

Q. And let me slow down. This is a common symptom that you see among schizophrenics that the turning up of the TV, the radios, things like that?

A. Yes.

[40] Q. And, then, subsequently reporting the reason they do that is because they try and get the voices to drowned out?

A. Yes. Yes. So they're not so loud, so they don't have to listen to them.

Q. Okay. We were talking about other evidence of his psychosis.

A. Yes. And then he stops grooming himself, he is attempting to cut his own hair, he's wearing a shower cap, he, I guess, wears these stocking caps on his head, is really getting to look just fairly bizarre. And it seems that this may have been in the service of preventing himself from being poisoned by the aliens. And I'm imposing a little bit of logic here that may not exist, you know. I'm inferring that this may have been part of the motivation, but I don't know for sure, because he's never been able to really fully communicate why he did all these things. Other evidence was his putting the strings with beads in his room and in his car, carrying a bird around in his car, putting quarters, all apparently to prevent others from intruding into his personal spaces, for what fear is not completely clear, but the behavior was becoming increasingly bizarre and reflected his delusional beliefs and confusion.

Q. In your review as you went through this, was [41] there ever a window of lucidity for Eric?

A. I don't think that there was a window of lucidity. There were some periods where he was a little better than others, but there was never a period where like for several months he was just fine.

One instance where he seemed to be a little better was after January 1st, 2000, came around and the end of the world didn't happen, he felt a sense of relief and he went back to school, but things didn't go well. You know, he was strange at school. And he may have held things together for a few weeks, but it wasn't long before it was obvious to his parents and his teachers and the other students that he was very weird. He wasn't like he used to be. There was something wrong with him.

Q. Speaking of that, Doctor, did you see this photo of Eric?

A. Yes. I was very surprised when I came in to your office last night and you had these two pictures up there and, you know, I just glanced at it quickly, and my initial thought was, oh, that must be a picture of one of Bryon's sons or something. And I took a closer look and I thought, oh, my, that's Eric. You know, hardly recognized him.

Q. And just for the record, I'm holding up the [42] picture of Eric's fall 1998 football picture.

And so when students have come into this courtroom and his family has come into the courtroom and talked about these appearance changes, we actually were seeing very dramatic changes, especially when you look at Eric, this football photo, and just the overall look of his health,

compared to what we see in January – or excuse me – June 21st of 2000?

A. This is the psychological, emotional disintegration that we see with schizophrenia.

Q. Is the fact that Eric was suffering a psychosis, does that equate to the fact that he – that you believe he was insane at the time of the shooting?

A. No. Psychosis does not equate with legal insanity. There has to be more.

Q. The fact that Eric has never indicated, for example, that aliens made me do this, I was hearing a voice from God, that type of hallucination, is that a factor in your determination whether Eric was insane at the time of the shooting?

A. Well, I think it's kind of more of a factor that tends to argue against his malingering, kind of creating symptoms to explain forbidden behaviors. And I have had people who have been very eager to tell me, oh, well, you know, the aliens made me do it, literally, [43] paraphrasing, but that's what they said. Eric has never offered to me anything about the aliens. I mean, during both of my interviews he never mentioned them. It was only when I raised it and said, well, there is this mention by your mom and others. Well, yeah, yeah, I do kind of think that, you know, people are sometimes aliens. And I said, well – like you, well, you could be an alien, you know. It was only drawing this out that he said anything about it. Otherwise, he doesn't comment on it. And I think that argued that, you know, pretty strongly against any kind of malingering. And even when I did probe with him about his

beliefs regarding these aliens, he didn't elaborate a great deal, didn't go into much detail.

And one of the things that I think is occurring in our kind of current culture is people are much more educated about mental illness and mental diseases and what it means to be psychotic and schizophrenic. And he may well have been aware and more patients are aware of what people – when people label someone as psychotic from the media, from being educated. So they're a lot less – they're a lot more reluctant to share their symptoms, they want to hide them because they don't think anything is wrong with them. They don't think their thoughts are crazy, but they know that others [44] might think their thoughts are crazy, so they don't really want to talk about it. And I think that's been partly the case with Eric, he – he is really – doesn't think anything is wrong him and he doesn't like it when people talk – you know, sort of suggest that he has some kind of problem.

Q. And I'd kind of like to go back to your interview with Eric at the Arizona State Hospital. On at least one occasion I was present. And, at that time, Eric had already been found competent and I was present because Eric would not talk to you initially; is that correct?

A. Yes.

Q. And during our discussions with Eric, did I tell him repeatedly and did we both encourage him to talk because you could possibly help Eric in this legal setting, and he continued to refuse to talk?

A. Yes.

Q. Okay. The reason I bring that up is because I know the prosecutor has mentioned on – I think in asking

you questions that is it a factor that once Judge Coker determined Eric was competent, that suddenly he started talking, but as you've read all the evaluators's reports in this case, did Eric – has Eric ever volunteered information about aliens or anything like that?

[45] A. No.

Q. And did he apparent – did he ever appear to try and use this as an excuse in any way for any kind of his behaviors?

A. No. No. I mean, just before we, you know – when I was talking to him briefly before the hearing here, the trial here today, you know, he said, well, you know, and I know Bryon wanted – is doing this GEI thing, but I'm not guilty, you know, that's – and I said, well, but, you know, Bryon's your attorney. Well, yeah, I know he's my attorney. Well, I mean, how are you going to prove that you're not guilty? Well, you know, I don't know. You know, there was no logic to some of the things that he was saying, typical of schizophrenics.

Q. I'd like to talk a little bit about your understanding of how the shooting of this police officer occurred. What's your understanding of what happened?

A. Well, my understanding is that the family had gone to a movie on the evening in question, Shaft. They had gone out to dinner before that, I think to a Sizzler, which is a place that – one of the few places that Eric felt comfortable eating from. They went to the movie, then he wanted to stay and see another movie. And his parents said, well, all right. And they went home. And they – you know, he never – never came home by the time [46] they went to bed. And, apparently, during the night Eric had

taken his older brother's truck, Gentry's truck, and was driving around the neighborhood in circles, and he was driving around and around, it was like 3:00, 4:00 in the morning, and had the windows down and had the radio on, blaring, or tape in, a CD, and I don't know exactly what, and which is – which, you know, kind of is consistent with his behaviors up till then. He wasn't able to sleep very well at night, the turning things up loud, you know, as I'm speculating, to drown out voices while he was turning it up loud in the car, in the truck, and he's just sort of wandering around the neighborhood. And police, you know, are called because he's causing a disturbance and police stop him. And it's not clear exactly what happens, but he apparently shoots a policeman. And my understanding is that this probably happened very rapidly, you know, shortly after the police stopped him. There wasn't a whole lot of time to transpire between the stop and the shooting. And then Eric, you know, took off somewhere in the neighborhood, and 12 hours, I don't know, 18 hours later, was apprehended nearby in the neighborhood.

Q. Okay. Do you think based on, again, your training and experience as a psychiatrist, that Eric was in any way trying to – preparing or trying to create an [47] ambush to kill this police officer?

A. I can't imagine that.

Q. Why not?

A. Eric's behaviors were just – there wasn't much purpose or, you know, didn't seem there was much rhyme or reason to his behaviors. You know, he was continually a surprise to his parents. They didn't know what he was going to do next, which is what they were so concerned about and why they wanted him in the hospital, you know,

he wasn't functioning in school, you know, he really wasn't functioning at all.

To hypothesize that he was sort of planning, you know, kind of a scheme to lure police I think is a bit of a stretch. I have trouble imagining that.

Q. Was – there's evidence that Eric – you mentioned that Eric hid out or evaded the police for 12 some hours. Do you think that reflects Eric's ability to appreciate or to distinguish between what's real and what wasn't real?

A. I think that it reflected that Eric was afraid and had been afraid for months, had been very frightened, you know. He was frightened that the end of the world was going to come, frightened that aliens were taking over people, were manipulating people, that his own [48] parents might be aliens. He really had a tremendous amount of difficulty perceiving reality as you and I see it. And there is, you know, reference that he became kind of preoccupied by this movie, The Matrix, which I saw once and was a pretty bizarre movie, but basically had to do with, you know, government forces, police forces, you know, basically alien police forces somehow inhabiting people's bodies and so forth, and he kept saying to his mom that these were real. So Eric may have had some kind of particularly enhanced fears of the police or people in authority were somehow in, you know, particularly controlling positions with this sort of alien presence in the community of Flagstaff.

Q. Okay. The fact that Eric shot a police officer, does the identity of the victim in any manner play in your opinion as to whether Eric was insane at the time of the shooting?

A. No. I think that Eric may well have killed himself, killed one of his family members or killed a total stranger suddenly. You know, I think that he was at great risk of, you know, doing something in the very near future. And, unfortunately, he was not hospitalized in time.

Q. For example, there was evidence that in this – in this trial that Eric had threatened his [49] brother, to kill his brother, had threatened to kill a kid at a party that he had had a fight with. Is it those types of evidence that indicate to you that the fact that he actually shot a police officer is irrelevant really to the overall look at what was going on with Eric?

A. Yes. I mean, he had threatened his mother, he had a gun, he had talked about killing himself, he had been aggressive at one point with his girlfriend, I mean, there was – or former girlfriend. There were a variety of times that he acted unexpectedly.

Q. At some point in time, Eric, this year, said to the effect of, you know, I'm innocent, you know, I was up at Lake Powell. And I believe he told you that and I know he told Dr. Moran that. Does that reflect on Eric's ability to distinguish between right and wrong?

A. It I think reflects Eric's schizophrenia. I think it's a – probably a reflection of a very primitive form of denial, going back again to when he was arrested and some of his statements he made, and they are transcribed, he really seemed to not have any awareness of why he was there and kept talking about suicidal ideas, basically. And I think that it's plausible that he just blocked them – what happened with the police, he just blocked out of his consciousness. It's hard to know exactly what he remembers about that time period. It [50] would really be speculation

to try to conclude. But I don't – you know, I can't totally explain it, but I don't think that it's like, you know, that he's malingering, you know, when he makes those statements.

Q. You mentioned kind of his statements with the police. I'm going to put up here and just have you reflect on some of the things that he did say.

And, Judge, that's also in your notebook. It would be Exhibit Number 3.

THE COURT: 3?

MR. MIDDLEBROOK: Number 3.

THE COURT: Josh. Thank you, Josh.

Q. BY MR. MIDDLEBROOK: And as that projector warms up, I will lay the foundation a little bit for what we are about to see. This was a transcript of Eric when he was being held in an interview room at the police station shortly after he was arrested for this shooting.

A. Yes.

Q. Okay. There it is.

MR. POWELL: There you go. Put some more light on that.

Q. BY MR. MIDDLEBROOK: Very kind of top of that line, I believe that's about page – unfortunately, I didn't number the pages, Judge, so I apologize.

THE COURT: It's number five.

[51] Q. BY MR. MIDDLEBROOK: Page five, we see that I'm in there. And you watched the videotape of this, as well, didn't you?

A. Yes.

Q. Basically, me telling Eric that, you know, it's very serious stuff and he continually says, yeah, well, I don't – yeah, well, and then he's left alone, and then this is where we start – can you tell us what – as you recall from the videotape, what Eric's mannerisms are as we see where it says, Eric: Take me to heaven, that type of thing. We'll get into what was actually said there in a little bit.

A. On the videotape I had a great deal of difficulty actually hearing what he was saying. He was sort of sitting there kind of hunched over, sometimes looking around and mumbling. I mean, it was practically inaudible, you know. It was kind of a little bit of a singing, but it wasn't very loud, it wasn't very clear, you know. He wasn't sort of looking at anyone or anything. He was just sort of, you know, kind of – it seems like sort of mumbling, singing a little bit to himself but in a muted way.

Q. And no one's in this room?

A. Not that I could see.

Q. Okay. And I can tell you because I was there [52] that there is no visible video camera, no visible recording devices, anything like that. Okay?

A. So I trust that this probably was some reflection of what was going on in his mind at the time.

Q. And then as we see, and you can see where I've got two little arrows, but jumping down to the second little

arrow, kind of that area there that's highlighted, when you saw that and that's brought to your attention, you know, what was reflective of that to you as to what was going on in Eric's mind?

A. That he was very disturbed, that he was frightened, that he just wanted it all over with, that's what it reflected to me.

Q. For example, one of the statements: Are you sure you want to follow me, God? You've got to stay true to your school. I will go down for yours if you go down for mine, and just kind of rambling?

A. Right. Some of it, it doesn't make any sense.

Q. And on the next page we can see where the two arrows are: From the start, I got a problem with you all so why do you all I – or I ain't got a problem with you all so why do you all have a problem with me? I mean, poison me, what the fuck does that do? Ah, just want to leave my life. I just want to, um, take me away. I want to go away. Take me home. I want to go away. Take me [53] home.

And he's just kind of singing that to himself and just rambling on?

A. Yes. And I think these are the same kind of statements that he had made to his mom when we would sort of rush over to her at where she was working and, you know, say, I just want this over with. I want to go to heaven, you know, statements like that, but that were very frightening to her.

Q. I've got one more thing I've got to do with the projector. You can turn the lights back on now.

THE BAILIFF: Okay.

Q. BY MR. MIDDLEBROOK: To be fair here, Judge, (sic) when you were looking as to whether Eric was insane at the time of this shooting, you were never able to develop any information as to what was actually going through Eric's mind?

A. No. It's my understanding that, you know, he really never describes that to anyone at any time or even hinted or, you know, made inferred references to it during the entire time he was in the hospital.

Q. And I think one of your references is up to detention officers to nurses to other inmates, anything like that to our knowledge he's never mentioned anything about what's happened?

[54] A. No.

Q. Is that reflective on whether you think Eric can perceive the difference between what was real and what wasn't real?

A. I think it just adds further support that he – you know, whatever he was thinking at that time, no one's probably ever going to know, he probably doesn't know, and it may be just gone at this point.

Q. I'd like to turn your attention to Dr. Moran's report. You've reviewed it – had the opportunity to review Dr. Moran's report?

A. Yes.

Q. Within his report he comments to the effect that around the time that Terry and Dave left Eric at Harkin's Theater, that Eric more or less looked normal to them, and

he uses that as part of the criteria in saying that in later concluding that because of that, Eric must have been functioning at a higher level function. Is the fact that Eric may have looked normal – and Terry and Dave kind of explained to us what normal for Eric was – but the fact that he may not have looked agitated, he wasn't ranting and raving, is that an indicator, a reliable indicator as to whether Eric would act violently in the next 12 hours?

A. No, not at all.

[55] Q. And why not?

A. Well, I mean, I think there's abundant evidence in the weeks and months leading up to this that Eric was very disturbed, was very psychotic, and there's no reason to think that while he was at this movie that these symptoms had disappeared. The fact that he wasn't shouting expletives, you know, at strangers in the theater or at the restaurant does not mean that he was not still believing that people were aliens, that people were trying to poison him, and that very strange and malevolent things were transpiring around him. No reason at all to think that. In fact, I think there's a lot of reason to think that all those beliefs were still very much present, still affecting his behavior, and probably had a major impact and influence in a major way on what he did when he killed the policeman.

Q. Dr. Moran also relies on a global assessment functioning scale as part of his conclusion that Eric, because of the level of function that Dr. Moran puts him at, that Eric would not have perceived what he was doing was wrong. First of all, I'd like to talk about this global assessment and functioning scale. What is that and how is it used by mental health professionals?

A. In the diagnostic and statistical manual, the DSM-IV, there – when you diagnose people you use five [56] axes, and I won't go into all those axes. At the bottom, though, is Axis V, which is the global assessment of functioning scale score, and that goes from zero to a hundred. And, primarily, that reflects in a very rough way someone's overall functioning at that point in time or, you know, over the past year.

Q. Is it used to determine the level or the severity of a delusion?

A. No.

MR. MIDDLEBROOK: Judge Coker, this particular scale is also included in Dr. Moran's report, so you'll see it there, I'm certain, when Dr. Moran testifies, as well.

Q. BY MR. MIDDLEBROOK: But, Dr. Morenz, I have kind of focused on it below a hundred, but only because I can't get it up there on the whole thing, but Dr. Moran said that Eric was functioning at about a 31.

A. He places global assessment of functioning scale of Eric at about 31 at the time of the shooting.

Q. First of all, what – assuming that that – I mean, that is his conclusion, what is significant about that as far as the 31 figure as it relates to generally patients that are being admitted or discharged from a mental health facility?

A. Well, that's pretty low function.

[57] Q. Okay.

A. That would be considered someone who is having serious problems.

Q. All right. And then assuming the 31 to 40 is an accurate assessment, what – as we read across there, what is significant about that scale as we look there?

A. Well, you have impairment in reality testing. This person is psychotic to some degree or they have major impairment in several areas, such as work, school, family relations, judgments, thinking or movement. He had both. And he didn't have some impairment, he had major impairment. And I think he had some major impairment in reality testing, so –

Q. And when you're looking at assessing or making a global assessment functioning score, do you continue to move down the scale until the lowest indicator or what's prevalent there is present?

A. Yes.

Q. Okay. Or the impairment is present?

A. Yes.

Q. So if we look at the 31 to 40 range, what do we see there as indicators? And, first of all, in using this scale, is there basically two components to it, functioning being one of them and the other behavior?

A. Well, yeah. They – I mean, they kind of [58] overlap with one another. But, yes, it means functioning and behavior.

Q. And that's kind of the overall and that's why we call it the global assessment functioning, is to really use it as a guideline to determine what the level of individual's functioning is?

A. Yes. And, again, it's a very rough guide.

Q. Okay. If we look at the lower levels as we – in the 21 to 30 range, is there anything significant about that as it would relate to Eric on June the 20th or 21st?

A. Well, I – I think that his behavior was considerably influenced by delusions, you know, all the hanging of the strings, the not showering at home, the not eating at home, all that is being influenced by delusional beliefs. Ah, I think that he. was unable to function in many areas of his life, so I think that fits, as well. And I think that, you know, even at the lower 11, 11 to 26, I certainly – you know, if I had examined him, had a chance to talk to his mom about all that had been transpiring, I would have considerable concern that there was some danger of him hurting himself or others, you know, in those weeks leading up to his arrest.

Q. Okay. And is that evidenced, for example, by just several days prior to the shooting that – is that [59] evidenced by just several days prior to the shooting that Eric had broke the nose of a kid and the kids testified, said that, you know, basically it was over a trivial comment of something that Eric had changed?

A. Yes.

Q. Dr. Morenz, I know you've reviewed many documents, you've talked to Terry, you've looked at photos of Eric's room, things like that. At the time of the shooting, based on your training and experience, could Eric distinguish between what was real and what wasn't real?

A. As we've already talked about, I mean, no one knows exactly what was on Eric's mind, but given how psychotic he was before and immediately after and everything we know about schizophrenia, I think that it is fair

and probable that he did not understand what he was doing was, you know – that they did not understand right from wrong.

Q. And thereby you believe he was insane at the time of this shooting?

A. I believe he was insane as under Arizona law.

Q. Thank you, Doctor. That's all the questions I have for you right now.

THE COURT: Thank you, counsel.

Ladies and gentlemen, we'll take our [60] morning break at this time for about five minutes. Thank you very much. We stand adjourned.

(Whereupon, a recess was had from 10:32 a.m. to 10:50 a.m.)

THE COURT: Let the record reflect the presence of the parties.

Counsel, you may begin your cross-examination.

MR. POWELL: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. POWELL:

Q. Doctor, good morning.

A. Good morning.

Q. I'm going to make good faith efforts to not ask you questions that you've already answered. There will be

sometimes where I have to set that – to kind of set the stage for a series of questions. So if I ask repetitive questions, that's the reason I'm doing that. I wrote down, I believe, your definition of insanity, your understanding of the Arizona definition of insanity, and I tried to put it up here on the easel. And I hope over the break you had a chance to look at that. Does that fairly reflect the statement of your understanding of the law of insanity in Arizona?

A. Yes.

[61] Q. And it's a two-stage or two-prong test. Would you agree with that?

A. Yes.

Q. And let me tell you, the state has not and does not intend to challenge the fact that the defendant suffers from a mental illness or a mental defect, and that it's most likely schizophrenia paranoid type. So we're not even really going to talk to you much about that. There may be an occasional question along the way. Okay?

A. Okay.

Q. What I'd like to talk about is your evaluation that you performed, your report and your testimony today. You told Mr. Middlebrook that I think you said you agree, schizophrenia alone does not equal insanity; is that correct?

A. That is correct.

Q. And that would be because that only satisfies the first step of the definition of insanity. It doesn't satisfy the second step. Correct?

A. Correct.

Q. And would it be proper for us to refer to psychosis as opposed to schizophrenia? I know they're not one in the same, but to generalize, could we do that today?

[62] A. I don't think that would be accurate.

Q. Okay. What I will do is stay with schizophrenia.

A. Yes.

Q. Now, there's been some mention of the DSM-IV-TR. Correct?

A. Correct.

Q. And you explained that to us. And in your report you referred to it. Correct?

A. Yes, I believe so. Let me see.

Q. And we'll get into that in a bit. Is it something that's relied upon by professionals in your area of expertise?

A. Its relied upon for diagnoses, yes.

Q. Do you know any mental health experts that do not use the DSM-IV?

A. I do not.

Q. So it's generally used?

A. It's pretty generally accepted, not loved but accepted.

Q. And, again, could you just give us a quick explanation of what the DSM-IV provides?

A. The DSM-IV is a listing of all the psychiatric diagnoses that are commonly accepted in the field with criteria for each of those diagnoses.

[63] Q. And sometimes you have to find two, sometimes you have to find three, sometimes one alone of the symptoms will satisfy the diagnoses?

A. Yes. It's a bit of a Chinese menu approach to diagnoses.

Q. Let's talk about how you reached your conclusion please. You did meet with the defendant, did you not?

A. Yes.

Q. And how many times have you met with him?

A. Oh, well, I have met with him, I guess, well, four times, including today.

Q. Now, in your report you mentioned two times. When was the third?

A. Well, it was another time when I was really wrestling with the issue of his competence to stand trial that I went up and tried to visit him. You know, he wouldn't talk so, you know, efforts were made to communicate, but there was really very little meaningful communication.

Q. Was that before the two that you refer to in your report?

A. Yes.

Q. And would you say it was productive at all?

A. Well, it was productive because I got to meet [64] him, I got to see how he behaved, how he responded to efforts to get him to talk, so there was some usefulness to it, absolutely.

Q. Did he provide you any information at that time, though?

A. No, not – no. No. He said very little.

Q. And the first time you refer in your report, I believe you say your meeting lasted an hour-and-a-half, approximately?

A. Yes.

Q. And Mr. Middlebrook was there – was present?

A. Yes.

Q. And, again, the defendant did not cooperate with you there, did he?

A. No.

Q. So would you consider that a nonproductive meeting?

A. Again, it was – it was productive because it was another instance of seeing him, seeing how he is responding to questions, seeing his appearance, so not as productive as I would have liked, but not – not totally useless either.

Q. Again, he provided no information during this meeting?

A. Some, but not very much.

[65] Q. And then you had the second, you referred to in your report the third overall meeting, and it was another hour-and-a-half. Correct?

A. Yes.

Q. And was Mr. Middlebrook present?

A. No.

Q. And – but he and the defendant's mother had somehow convinced the defendant to speak with you?

A. I think it was probably mostly his mother.

Q. And when you met him on this occasion, it was just the two of you for the hour-and-a-half?

A. Yes.

Q. That was not tape recorded, was it?

A. No, it was not.

Q. And it was at this time that the defendant denied any involvement in the murder of Officer Moritz?

A. Yes.

Q. This is where we will be referring to a Sarah story first arose, as far as you know?

A. Yes. I mean, I hadn't heard it before.

Q. That's what I'm talking about is you, your knowledge.

A. Yes.

Q. Now, you rejected that version of the facts outright, did you not?

[66] A. Yes.

Q. Please let the Court know what the defendant told you about his activities on the day of the murder, the evening before and the day of the murder.

A. Ah, that he had gone to the movies with his parents, as I have already stated, and then stayed, met this girl named Sarah, and they took a bus or they drove to Lake Powell, spent some time there and came back. And that basically was his story.

Q. He also told you when they returned almost immediately he was arrested by the police?

A. Shortly thereafter he was arrested, yes.

Q. That he was just walking down the street, the police said, freeze, you're under arrest. He stopped. He didn't tell you about a chase or anything like that. He just stopped and was arrested?

A. I don't think he went into detail about the arrest.

Q. And you say you rejected this outright. Why did you do so?

A. Well, you know, I – my understanding is the evidence was pretty clear that Mr. Clark had taken Gentry's truck and shot a police officer.

Q. And you attributed the story to several different sources or reasons, and one was confabulation. [67] It could have been confabulation?

A. Yes.

Q. Please explain what that means.

A. That Mr. Clark had no memory for the time and filled it in with this very implausible story, so sort of filled in the gap in his memory with this – with Sarah's story.

Q. The other possibility was fear. Correct?

A. Yes.

Q. And fear of what?

A. Some kind of delusional fear; fear from, you know, the aliens, his delusional beliefs, and perhaps more reality based fears regarding retribution, the courts.

Q. And if that was the reason why, he would basically just be lying?

A. Yes.

Q. So that's a possibility?

A. Yes, it is a possibility.

Q. He also told you during this interview that in the months leading up to the murder he smoked marijuana most evenings?

A. Yes.

Q. At a school?

A. Yes, somewhere near his house.

[68] Q. And he drank on the weekends?

A. Yes.

Q. And that he would get drunk but his parents would not notice that?

A. Yes.

Q. And when he told you this about his drinking and his drugging with marijuana, did you consider that true?

A. Not – I was not completely sure. I certainly believed that he was drinking and using marijuana. The extent of his use was a question mark in my mind. That was unclear because of some of the statements his mom had made to me. You know, I certainly thought at times he may have become intoxicated on alcohol and used marijuana, but I wasn't totally convinced that it was quite as frequent as he describes, especially in the weeks leading up to the offense.

Q. And that was based upon statements of the mother?

A. The statements of the mother that she spent, you know – he spent, you know, 95 percent of his time with her, and he would – almost never left, you know, her presence, so that's what made it, you know, a little bit questionable. It's still possible, he could have gone out at night when they were sleeping. He didn't [69] sleep well at night. So it's just kind of a little bit of an unknown.

Q. You never satisfactorily resolved it in your mind how much he was using beforehand?

A. No. I mean, I think its, you know – he was using, but the extent of his use is what's unclear in my mind.

Q. Let me interject something here. You're a clinician and forensic doctor. And if – if you could just very briefly tell us the distinction between those two.

A. I'm a fully trained psychiatrist who, the forensic part, the forensic psychiatry part is, I use my psychological and psychiatric knowledge to help assist in the resolution

of legal questions, such as, you know, a question of whether someone is suffering from a mental disease at the time an act was committed and, you know, what their thinking was at that time.

Q. Now, as a clinician you're going to evaluate patients. Correct?

A. Yes.

Q. And these patients usually come to you requesting assistance. Would that be correct?

A. Yes.

Q. And, at that point in time, you're going to [70] believe what they tell you generally, aren't you?

A. Well, yes, to some degree, it depends on the patient and it depends on how disturbed they are. Often, we have questions about the reliability of the histories and statements, but we want to kind of talk to family and friends about that, so, yes, to a point.

Q. We're not saying this is black and white, but what I'm going to do is compare that to people you interview in a forensic setting. Wouldn't it be fair to say that if you're interviewing an individual charged with a serious crime, you're going to take the statements they make to you with a much larger grain of salt than when you're acting in a clinical manner?

A. Yes. And, certainly, in a forensic setting you're always going to want to carefully look for evidence of malingering, and it will be crucial to review a lot of collateral information to make, you know, certain that

statements that are being made to you by a defendant are consistent with other statements.

Q. But, eventually, in either setting, you're going to have to resolve in your own mind whether or not the person is telling you the truth?

A. Well, in a clinical setting it's not always that important ultimately whether someone's telling you the partial truth or a whole truth. I mean, you [71] certainly want to get enough information so that you can proceed to make some kind of reasonable diagnosis and begin some kind of treatment. But, you know, in a clinical setting, we're there to help someone. The issue is not whether they're telling the truth or not.

Q. So, therefore, it's more important to make those determinations in a forensic setting?

A. In a forensic setting it – certainly, the accuracy of statements becomes much more important.

Q. He told you in – and, again, we're still at the third meeting, I think. The defendant told you that leading up a few days or weeks beforehand, before the murder, that he had gone to a couple parties and gone to a dance. Do you recall that?

A. Yes.

Q. Now, did you consider that true?

A. Um, getting kind of an exact time of when those parties occurred, I mean, I knew there was one party that was clear, corroborating evidence of that. He mentioned the dance and another party. It just was a little less certain when those occurred or, you know, if they had been

many months ago as opposed to two or three months before – before the incident.

Q. But did you believe the fact that he had gone to a couple of parties and a dance at some time?

[72] A. I thought that was probably true, given what I knew, that he had, and probably more than that.

Q. Now, he denied use of LSD and other drugs. Did you accept that as true?

A. Well, I knew he had been found with a fair amount of LSD at one point. I also knew that the vast majority of the witnesses that gave statements had not seen him use any other drugs. So I guess I would say my – my working hypothesis was, he probably did not use very much LSD. He might have tried it a couple of times. I'm not sure.

Q. But in light of the fact that when he was arrested two months before the murder, he had 42 tabs of LSD, that was certainly factored in?

A. Yes. That's what I was referring to, yes.

Q. You certainly know that 42 tabs of LSD is a large amount of LSD?

A. Yes.

Q. He also told you that his family was his – or were his best friends?

A. Yes.

Q. He also told you his parents may be aliens?

A. Yes.

Q. But, in spite of that, they were still his best friends?

[73] A. That kind of conflictual sort of logic is – you can see that very common with schizophrenics, you know, where two seemingly opposing, you know, opposite sorts of things can – can be present in the person's mind but its part of their whole irrationality.

Q. He never disputed that his family were his best friends, though?

A. No. I didn't, you know, kind of ask him and say, well, yeah, but you said they were aliens.

Q. He denied hallucinations, mind control or telepathic communication. Correct?

A. That's correct.

Q. And did you accept that as truthful?

A. Um, not completely, because he did – he did refer to these kind of special communications that he was receiving; the signs, the license plates. And then, later, in Moran's report, he apparently told Dr. Moran that the TV and now the radio was communicating with him. So my suspicion was that he – he was. And it does seem that he was experiencing some external forces that were communicating with him and might have been influencing his behaviors.

Q. Now, you also talked with the defendant's mother, Terry Clark?

A. Yes.

[74] Q. And, actually, you had a longer meeting with her than you had with the defendant, didn't you?

A. Yes.

Q. Her meeting was two hours long?

A. Yes.

Q. And it was a productive meeting?

A. Yes.

Q. She's a rather loquacious woman, isn't she?

A. She was very helpful with the story historically.

Q. And she provided information to you about her son, the defendant?

A. She provided a lot of, yes, very painful information about her son.

Q. And you seriously considered the information she provided?

A. Yes, I did. I thought that she was a very important source of information about his behavior over the years leading up to this instance.

Q. And one of the items she told you was that the defendant was found one night sleeping with a gun pointed towards his head, didn't she?

A. Um, you know, I am not completely sure whether she said that or I read that into it, but it's been clarified that he was found with a gun. It wasn't [75] pointing at his head. So somehow that got distorted along the line.

Q. Your report on page six does refer that she discovered her son asleep with a handgun pointed at his head?

A. Yes.

Q. She also told you she was unable to obtain psychiatric help for the defendant, didn't she?

A. Yes. She didn't completely fail. They did get him into Aspen Hills (sic) Hospital with the assistance of police on one occasion, but she wasn't able subsequent to that to get any psychiatric help.

Q. She told you that the defendant was removed after three days in Aspen Hill – Aspen Hills against medical advice?

A. Yes.

Q. Defendant never told you or defined what an alien was, did he?

A. No.

Q. He never referred to the police as aliens?

A. No.

Q. In your report on page four – and I don't know if you have a copy.

A. Yep.

Q. On page four, under the paragraph labeled, [76] "Psychiatric History" –

A. Yes.

Q. – towards the bottom you have a statement about the defendant screaming in jail on 6-23-00 –

THE COURT: Excuse me, counsel, hold on just a second. Let me catch up to you. Which one was that in the defendant's exhibits?

MR. MIDDLEBROOK: 5A, Judge.

THE COURT: 5A. Thank you. And what page are you on, counsel?

MR. POWELL: Page four, Judge.

THE COURT: Thank you. And the –

MR. POWELL: And the heading is, "Psychiatric History," and we're going to go down to just the last couple of lines on there.

THE WITNESS: Yes.

Q. BY MR. POWELL: The defendant was in Coconino County Jail on 6-23-00. He stated: Fuck you. You're all fucking aliens. Correct?

A. Yes.

Q. And that was gathered from some of the documentation you had reviewed that had been provided to you by the parties?

A. Yes.

Q. And page 1656 through 8, that's not all he [77] told the jailers, was it?

A. No. He said other things. I don't recall offhand.

Q. Let me ask you and then I'll hand this to you. They came – the jailers basically came to take him to medical, correct, if you remember?

A. Yes. Something like that, yes.

Q. And he didn't want to go. And his first comments to them, not that they were aliens, was: Fuck you, you fucking dumb ass. You can't touch me.

Do you recall that being in the report?

A. Not exactly, but he was obviously hostile.

Q. I will hand this to you in a moment. And he was getting on the phone. There was a phone present. He was getting on the phone, calling his mother, and the – one of the jailers tried to take the phone away from him and the defendant took a swing at him. Do you recall that?

A. Um, not exactly. But, again, I knew he was very hostile.

Q. And then he said, fuck you, punk. Fuck all of you, you fucking aliens.

So prior to referring to these people as aliens, he calls them a fucking dumb ass and a fucking punk. Correct?

[78] A. Yes.

Q. And would you like to look at the report just to –

A. I trust you read it correctly.

Q. And that part was not reflected in your report, those other statements?

A. Yes.

Q. An area that was touched on briefly, you said that drugs and alcohol can exacerbate existing psychosis?

A. Yes.

Q. Particularly in schizophrenic individuals?

A. Um, not necessarily particularly. In any person that's having major mental problems, drugs and alcohol usually make it worse.

Q. If there is a latent or a dormant psychosis, can it enable it to come forward?

A. Um, yes. I would say that probably is the case, yes.

Q. An illness would not come forward without the benefit of the drugs and alcohol?

A. Well, I'm not so sure I'd agree with you there. Its sort of like someone who is vulnerable, is on the verge of, and uses drugs, you know, it's sort of – sort of gives a little push to the snowball as it goes down the hill.

[79] Q. And the defendant told you that he had been using marijuana and alcohol since 8th or 9th grade, didn't he?

A. Yes.

Q. Would it be possible this alcohol and drug use could have exacerbated his psychosis?

A. I think it probably did.

Q. Stressors can also exacerbate a condition. Correct?

A. Yes.

Q. And would you consider being arrested a potential stressor?

A. Yes.

Q. Being incarcerated in a jail or a mental facility?

A. Yes.

Q. Being charged with first degree murder?

A. Sure.

Q. Back to the DSM, I'm referring to IV-TR when I say DSM, there are five axes there with regards to diagnosis of mental illness, as you told us. You talked about just the fifth on direct examination. And what I'd like to do is ask you, these are all, including the fifth, are generally accepted in the mental community, are they not?

[80] A. Yes.

Q. And that's the GAF scale?

A. Yes.

Q. Now, in your evaluation you referred to I, II and III, do you recall that?

A. Yes.

Q. And that's on page six of your report, Axis I, paranoid schizophrenia, history of marijuana and alcohol abuse; Axis II, no diagnoses; Axis III, no diagnoses.

Please explain your evaluation of Axis II.

A. Well, Axis II is for coding personality disorders and things like mental retardation, and I did not believe that he warranted those diagnoses. And Axis III is for coding medical problems that may be causing the problems on Axis I.

Q. And you didn't think that was necessary?

A. No.

Q. You didn't think he had any personality disorders pre-existing his schizophrenia?

A. No.

Q. No oppositional defiance or anything like that?

A. No.

Q. And why did you not refer to Axis IV and Axis V?

[81] A. Well, Axis IV is the psychosocial stressors in a person's life. And, as you've already indicated, Axis V was the GAF scale. And they're just very rough guides that I didn't believe were very helpful here, so that's why I didn't use them.

Q. Let me ask you this: On Axis IV why would stressors evaluation not be helpful?

A. Um, well, I guess I kind of laid out in my report pretty clearly, you know, what all the kinds of factors and problems that he had had. And, you know, I could have said psychosocial stressors, you know, accused of first degree murder, you know, in the state hospital for three years, you know, things like that, but it's sort of very rough. I mean, I'm kind of repeating the obvious. And the global assessment of functioning scale score, as I said, is just a very rough guide.

It's kind of obvious from the report in my description that his function was very poor. You know, the GAF scale gives numbers, you know, which are sometimes problematic because the numbers may provide a false sense of precision that really doesn't exist. We have no special technology, you know, that can really clearly discriminate

whether someone warranted a 22 or a 24 on the GAF scale. But as I have already talked about with Mr. Middlebrook, clearly he was in the more severe, [82] you know, compromised functioning scale, the lower end of the scale.

Q. Now, you say it's a rough estimate. Again, its generally accepted in your field?

A. Yes.

Q. GAF evaluations – well, let me ask you this: Do you ever work with sexually violent predators?

A. Yes.

Q. When you do an evaluation of them, do you do a GAF evaluation?

A. No.

Q. Did you perform any types of tests on the defendant?

A. No.

Q. Do you believe there are some tests that are generally accepted in your area of expertise that could have been performed?

A. Yes.

Q. And you did not perform any of those?

A. No.

Q. You mentioned something that makes me think that you have heard about what had been referred to as Aaron's story. Are you familiar with Aaron's story?

A. Yes.

Q. When were you made familiar with that?

[83] A. Um, yesterday.

Q. When did you interview Mrs. Clark?

A. June 19th of 2003.

Q. How – who did you learn Aaron's story from?

A. Um, Mrs. Clark had provided me with one review of her kind of history of all of his symptoms and problems, and then she had written another one that she had provided to Mr. Middlebrook, which I was provided yesterday, which included descriptions of Aaron's story.

Q. How many pages is that second one?

A. Um, it's about 20. 19.

MR. MIDDLEBROOK: 19.

Q. BY MR. POWELL: And in there could you go and see the date that Aaron's story took place? You may want to look around August, 2000.

A. Yes, 8-20-2000.

Q. 8-20-2000. And you were first made aware of that yesterday?

A. Yes.

Q. And when Mrs. Clark met with you on June 19th of this year, she was – again, she was very helpful in providing information?

A. Yes.

Q. Did she appear to be trying to provide information to assist her son?

[84] A. Well, you know, she obviously wanted to help her son in any way that she could, but she was answering my questions and I think trying to explain her son, as well as understand her son herself.

Q. Let's move back to your report and page seven, conclusions. And we have one paragraph here under conclusions. And, basically, the first half, maybe the first two-thirds, you explain chronically psychotic as a result of the schizophrenia since approximately sophomore year in high school. Correct?

A. Yes.

Q. And then you explain that in the next few sentences?

A. Yes.

Q. I'd like to go down to the last few sentences here, beginning with: It is not known. If you can find that. Its right about the middle two-thirds down.

A. Yes.

Q. And in there you have: It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense. Correct?

A. Yes.

Q. But given that he was very psychotic before and after the alleged offense, it is reasonable to infer – and that's your word, infer?

[85] A. Yes, it is.

Q. – that his perceptions of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality.

And you continue on: Thus, there is considerable evidence that indicates Mr. Clark probably did not know his acts were wrong at the time of the alleged offense.

Is that still your conclusion?

A. Yes.

MR. POWELL: If I could have just a moment, your Honor.

THE COURT: Certainly.

Q. BY MR. POWELL: What I have written up here is the word "refer," the phrase "probably bizarre," and "probably did not know acts wrong," and that's a paraphrase right there. That is – does that summarize your conclusions?

A. Yes.

Q. During our interview – I did have an opportunity to interview you. That took place on July 3rd of this year at your office?

A. Yes.

Q. And Mr. Middlebrook was present?

A. Yes.

[86] Q. Detective Garcia and myself, and we had a court reporter there?

A. Yes.

Q. And during that interview I asked you the question and you responded that you couldn't say conclusively defendant did not know what he was doing was right or wrong. Do you recall that?

A. Yes.

Q. I can show it to you if you need to.

A. No. I can't say with a hundred percent certainty. I don't think anyone can.

Q. I asked you: Can you affirmatively say – and this is page 61, right at the top – can you affirmatively say at this time that the defendant did not know what he was doing was wrong when he killed that police officer?

And you responded: I cannot conclusively say that. I think there is a lot of indicators that that probably was what happened, but I don't know exactly what he was thinking.

And you stand by that?

A. That's correct.

Q. Now, let's go back to your report. Your report is six – seven pages. Correct?

A. Yes.

[87] Q. No where in there do you really discuss the events of the early morning hours of June 21st of 2000, do you?

A. No.

Q. Was that an intentional omission on your part?

A. You mean this is regarding his statements like that we have talked about, this was when he was arrested?

Q. No. Actually, I'm talking about the time that he killed the officer.

A. Oh. I'm sorry. I didn't hear you correctly. I'm sorry. Repeat question.

Q. Yeah. I apologize. I asked you: There's no mention or discussion of the events of the early morning hours of June 21st. And, as we know, Officer Moritz was killed about 4:50 a.m. on the 21st. Did you anywhere address that in your report?

A. Oh, no.

Q. And then my next question is, was that an intentional omission on your part?

A. Um, what I was – I mean, I don't usually include the police description of what occurred, I mean, because that's available in police reports. What I'm interested in is the defendant's perceptions and that's what I include. That's what I was focused on.

MR. POWELL: Excuse me, your Honor. I [88] just have to get another pad.

THE COURT: Certainly.

Q. BY MR. POWELL: Did you consider the events surrounding the murder of the officer in reaching your conclusion, the physical events that happened?

A. Oh, yes. I went over those fairly closely. I went out to the – you know, before trial today, I went out to the

crime scene last night just to – so I could get a sense of, you know, exactly where things were and, you know, kind of what – you know, where things were located so I had a better idea of the neighborhood and the situation.

Q. And that was done last night?

A. Yes.

Q. I'd like to go through some things and ask you about them, evidence we've had presented in court over the last couple of weeks.

You are aware that the defendant – there's been testimony that the defendant, weeks before the murder of Officer Moritz, went to Thorpe Park and told some individuals that he was going to lure a police officer to him by firing a .22 into the air. When a police officer arrived and exited his car, he was going to shoot and kill him with a .22.

Was that factored in your conclusion?

[89] A. Yes.

Q. Now, you know that he was with his parents beforehand, and they have commented on his demeanor at the time; they basically said he was normal. You understand that?

A. Well, that's what they said, but he was not normal in any way.

Q. That's what his parents said, though?

A. Well, I think his parents were talking about that his behavior wasn't particularly problematic at that moment in time. Like I said earlier, he wasn't shouting

expletives or his behavior wasn't, you know, out of control, he wasn't jumping to the floor or, you know, doing other odd things, so he was kind of not a problem at that moment in time.

Q. Okay. Now, you earlier told us you couldn't tell us what was in the mind of the defendant, so you certainly can't tell what was in the minds of his parents either, can you?

A. That's correct.

Q. And we also had a witness who saw the defendant at the Sizzler restaurant an hour or so before – maybe two hours before they left for the theater, and he was acting – said he acted normal. Did you factor that into your conclusion?

[90] A. Yes.

Q. You understand that there was never a mention of a handgun that the parents, this person at Sizzler, no one said that he had a handgun that they could see on him?

A. Um, I don't recall that, but it's my understanding he didn't at that point.

Q. So he would have had to have obtained the gun afterwards?

A. I guess. I don't know. I mean, that part I'm not sure about.

Q. But there was no mention of anyone seeing a weapon before the killing of the officer?

A. I don't recall any mention of that, no.

Q. Excuse me. Now, we know at some point in time the defendant had to travel to his home, he had to enter the home, he had to enter his brother's room and he had to obtain his brother's keys from either a desk or a dresser inside that room. We understand that. Do you agree with that?

A. Yes.

Q. And did you factor that into your conclusion, those facts?

A. Yes.

Q. Then he went to the brother's truck and began [91] driving around in a quiet neighborhood between 4:00 a.m. and about 4:50 a.m. That's your understanding?

A. Yes.

Q. And he was playing his stereo very loudly, which was waking up police (sic) and generating 911 calls. You understand that?

A. Yes.

Q. You understand that he drove in one route at least 22 times, a minimum of 22 times?

A. Yes.

Q. And because the neighbor was actually counting as he drove on by?

A. That's my understanding.

Q. Just to interject something here, if an individual wanted a police officer to come to him because he had

plans, could you imagine a much more provocative behavior than what we have just described?

A. I can imagine all kinds of provocative behaviors.

Q. Could you – would you agree that this could very well be defined as provocative behavior, if the person's intent is to lure a police officer to him?

A. Sure.

Q. We know that Officer Moritz responded, had his overhead lights on, we've heard the radio dispatch which [92] has times on it, we know he had his overhead lights on, he made a statement to dispatch, I've got one running on me, and then 50 seconds later we know he said, basically, he stopped, I'm going to be out with him, and he radioed in the license plates of the truck. We also know from seeing witnesses that the officer had to illuminate his overhead lights – or I'm sorry – to use his siren for several seconds, I believe. You understood that to be true?

A. Yes.

Q. You did know that the defendant, when he did pull off, pulled off just a half block, I think it's been described, from his home?

A. It was very close.

Q. And, again, let's go back. He did say his parents were his best friends. Correct?

A. At one point, yes.

Q. Are you aware that when he was stopped, he was going south on Gillenwater, and if he would have continued in that direction, he would have basically run right into his own home?

A. Ah, I think you had to turn a little bit.

Q. Very short?

A. So, not quite, but he was very near his home.

Q. And headed in the right direction?

[93] A. Yes.

Q. We know the defendant at some time exited the vehicle. Correct?

A. Yes.

Q. And, at some point, the police officer exited his vehicle. And we know that the defendant shot the police officer and killed him. You know all that?

A. Yes.

Q. We know the defendant fled, successfully concealed himself from the police from about 4:50 a.m. to about 9:30 p.m., a period of about 16-and-a-half hours; we know that?

A. Yes.

Q. You understand this is one of the most intensive manhunts in Northern Arizona history because it was all confined to a special confined area?

A. Yes.

Q. Yet, the defendant was able to avoid detection for 16-and-a-half hours?

A. He did, yes.

Q. You considered that in your conclusion?

A. Yes.

Q. You know the defendant attempted to conceal the murder weapon?

A. Um, by putting it in a hat and throwing it [94] away somewhere or dropping it.

Q. Yeah, putting it against a shed. We have photographs of it. We all know what happened. But you're aware that he tried to conceal it, put it somewhere?

A. He put it somewhere, yes. I'm not sure what he did with it.

Q. And you're aware a minute or two before his arrest, that he was outside – seen outside of his own home; you're aware of that?

A. Yes.

Q. And that he ran from the police?

A. Yes.

Q. And he didn't stop until he was confronted by two armed detectives; you're aware of that?

A. Yes. Something like that, yes.

Q. And you considered that?

A. Yes, I did.

Q. But in your report there is no mention of any of that, anything we just discussed?

A. No. Like I said, I don't usually put a recitation of the police reports.

Q. Going back to the definition of insanity, we have met number one.

Number two, such severity that the [95] defendant did not know his act was wrong.

Don't you think it's very fair and necessary to consider what happened around the time of the crime and at the time of the crime to see whether it satisfies the second prong?

A. Yes. Of course.

Q. But you did not address that in any manner in your report?

A. I did not put it in my report, that's correct.

Q. Sir, I'm going to hand you a copy of the DSM-IV, unless you have one there.

A. No, I don't.

MR. MIDDLEBROOK: He can have my copy.

MR. POWELL: I copied this straight off.

Q. BY MR. POWELL: And it's open to page Roman numeral XXXII. If you could take that please. And I'm going to hand a copy to the Court and counsel also.

THE COURT: Counsel, is this going to take very long? If it is, I will take a lunch break. If it's going to take just a couple minutes, I will continue.

MR. POWELL: We could take lunch break.

THE COURT: Ladies and gentlemen, we'll take our lunch break right now. We will reconvene at 1:30. Thank you.

MR. POWELL: Your Honor, may I ask one [96] thing on the record? Since the witness is testifying, could I ask that he not consult with any of the attorneys over the lunch break or that we be allowed to be present, also?

THE COURT: If there's going to be consultation, I think both attorneys should be present. Okay?

Thank you, Doctor.

THE WITNESS: Yes.

(Whereupon, lunch recess was had from 11:45 a.m. to 1:33 p.m.)

THE COURT: Let the record reflect the presence of the parties.

Counsel, you may continue your cross-examination.

MR. POWELL: Thank you, your Honor.

Q. BY MR. POWELL: Good afternoon, Doctor.

A. Good afternoon.

Q. Before we go into the area I was going to begin with in the morning, I'd like to pick up some other little things here. There were – there were comments and testimony this morning about suicidal thoughts of the defendant, and I'd like for you to comment on the fact that he made some reference allegedly to his mother, and then we have the statements he made when he was in [97]

custody after his arrest on the 21st. Do you feel that he was actually suicidal?

A. I think that, yes, he was.

Q. Now, he certainly had the opportunity to commit suicide the evening when the gun was found in his bed. If we say the gun was loaded and operable, he certainly had the ability to commit suicide then, didn't he?

A. Yes.

Q. And he certainly had the ability to commit suicide June 20th or 21st, whenever after he picked up the gun that he used to kill the officer with, he had the ability to kill himself then, didn't he?

A. Yes.

Q. You are aware, Doctor, that the defendant successfully completed his junior year at Flagstaff High School, aren't you?

A. Um, I guess it was my understanding that he didn't complete all of the courses. And whether or not they gave him credit for the year or not, I'm not sure.

Q. Okay. I believe the testimony was – and I can stand corrected – but I believe he took correspondence classes in the fall semester, completed only one of those, but then successfully completed his classes and received passing grades in the spring [98] semester.

A. Okay.

Q. Would you agree with that? Would you take issue with that, I'll ask?

A. No.

Q. Okay. Wouldn't you say it's just a supposition on your part that the movie, Matrix, may have enhanced the fear of the defendant with regards to police officers?

A. It may – it may have enhanced or reflected, but, yes, it is speculation.

Q. Now, I'd like to talk about reports generated. And I'd like to talk about reports you generated in a forensic capacity as opposed to a clinical capacity. And let me ask you, how long have you been a forensic physician?

A. I started doing forensic work, um, not long after I finished my residency in 1982. So, really, probably '83, '84 I was hired to do some consultations to our court clinic in Pima County, and I graduated more and more as time went on.

Q. So you've continuously done forensic reports?

A. Yes.

Q. Okay. I should say forensic evaluations and the resulting forensic reports?

[99] A. Yes.

Q. And you undoubtedly know the purpose of writing a forensic report, don't you?

A. Yes.

Q. And the importance of being accurate with a forensic report?

A. Yes. Of course.

Q. You know the parties rely on the accuracy and the completeness of the reports. You agree to that?

A. Yes.

Q. And the parties consider the report a reflection of your efforts in the evaluation process?

A. Yes.

Q. And you know the report can have a significant impact on the outcome of a case?

A. It may.

Q. An example here, your report, which I should say has been admitted to the Court, it's not just something you were going to testify from. The Judge is actually going to get to read it and consider it during his deliberations. Your report could make the difference between the defendant possibly spending the rest of his life in prison and the defendant spending the rest of his life in a mental institution. You understand that?

A. Yes.

[100] Q. And you certainly take your responsibility seriously?

A. Yes, I do.

Q. You would never knowingly place false information in the report?

A. No.

Q. And you would never skew an opinion one way or another?

A. Skew an opinion in what way? What do you mean?

Q. Yes. If you're retained by one side, you remain a scientist, you remain a physician, and just because you're being paid by one side, you don't lean towards one side?

A. I strive for objectivity.

Q. And the Court and the parties can accept that the conclusions as reflected in your report are correct to the best of your ability?

A. The Court can accept my opinion as correct?

Q. Yeah. Well, your – the different things reflected in your report as being correct?

A. Yes.

Q. Now, I'd like to go back to your conclusion again – well, before I do that, let me ask you this: I notice no where in your report is there any language [101] regarding the reasonable degree of medical probability. Was that an intentional omission or an inadvertent omission?

A. Um, I don't usually use that language.

Q. Is there a particular reason?

A. Well, the reason is is that, you know, it's something that's debated and is debated in, you know, the circles that – where we discuss, you know, how to do forensic reports and how to approach forensic cases. And there's kind of a mixture of opinions about, you know, whether that should be in the report or whether that's desirable or not. And, you know, it's not something that I've had a strong feeling about. And I've certainly given oral testimony here that these are to a reasonable degree of medical probability, but I typically don't include that in my reports.

Q. Again, if we could go to page seven of the report, the last couple sentences: It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense, but given that he was very psychotic before and after the alleged offense, it is reasonable to infer that his perceptions of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality; thus, there are considerable evidence that indicates Mr. Clark probably did not know [102] his acts were wrong at the time of the alleged offense. And the word I'd really like to emphasize here, the word you use, infer, and this brings us back to where we were this morning when we broke, Roman numeral page XXXII in the DSM-IV –

MR. POWELL: Judge, do you still have your copy?

THE COURT: Yes, I do. What page are you on, counsel?

MR. POWELL: Judge, its in the beginning, it's Roman numeral – which always confuses me – but it's XXXII.

THE COURT: Okay.

Q. BY MR. POWELL: And, Doctor, the reason I'm giving you the actual treatise is so that you can follow and make sure I'm not misstating anything. And I'd like to look at Use Of DSM-IV In Forensic Settings. And it begins – and just ask if this is correct – When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood.

Do you agree with that?

A. Yes.

Q. If we go down just to the third line on the [103] next page: In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect."

Is that a correct reading?

A. Yes.

Q. And do you agree with that?

A. Yes.

Q. And you agree that the phrase "mental disease" and the phrase "mental defect" are the two phrases used in our insanity statutes?

A. Yes.

Q. If we could go down to the next paragraph, about halfway, in the beginning on the far left is: Moreover. And I'm going to read that.

Moreover, the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorders. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular [104] time.

Do you agree with that?

A. Yes.

Q. Now, Doctor, is it your opinion that, as reflected in your report, which we know you take very seriously, you're asking the Court to infer from the fact that the defendant was psychotic before and the defendant was psychotic afterwards, that he was psychotic at the time and was insane at the time? Is that what you're asking the Court to do, to infer?

A. Maybe you can repeat that question.

Q. We have read your conclusion where you ask or you state: It is reasonable to infer. And what you're asking the Court to infer is that because the defendant was psychotic beforehand, before the murder, was psychotic afterwards, he was therefore psychotic and insane at the time of the murder. Is that what you're doing?

A. Well, no, not really, because, you know, I'm inferring, and this is my opinion, it's very clear to me, your Honor, that it is your decision to conclude whether, you know, this – this scenario that I painted a picture of was in this case what happened or not. So I'm not asking the Court to make this inference. I'm suggesting this is what I believe probably happened, but it's up to [105] you, Judge Coker, to decide whether he believes that's the case or not.

Q. But even if it's you inferring, that is prohibited from this language in the DSM-IV, is it not?

A. No.

Q. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

A. Yes. And that's what we talked about earlier, that schizophrenia does not equate with legal insanity.

Q. And no where in your report have you placed your thoughts, your impressions of the facts of the case leading up to and after the murder and during the murder to allow the Judge to evaluate what your thoughts are there with regard to step two?

A. I'm not sure I understand the question.

Q. Do you agree that because the defendant – if we accept he was psychotic before and he was psychotic afterwards, that alone is not enough for an insanity finding?

A. That's correct.

Q. But isn't that what you're asking the Court indirectly? Isn't what you're asking the Court to do in [106] this last paragraph?

A. Well, um, no. I don't – I don't think – I mean, you made it extremely simplistic. I think that what I'm trying to state is to give all of the background and then describe, you know, in a kind of paraphrased, brief way, a summary way, what I believe was likely, probably what was going on at the time of the offense in Mr. Clark's mind, and trying to provide that information to the Court, to Judge Coker, so he can make a reasoned decision.

Q. But you haven't given Judge Coker any information with how you deal with the Thorpe Park incident where the defendant told people he was going to do what he did, and you haven't given him any explanation as to why the defendant ran and was so successful in hiding,

why he concealed a weapon; you haven't done any of that in your report, have you?

A. No, I have not.

MR. POWELL: If I could have just a minute, your Honor.

THE COURT: Certainly.

Q. BY MR. POWELL: Doctor, in that you have not stated everything that you considered, particularly the facts surrounding the incident, the murder, you performed no tests on the defendant, you didn't do a complete [107] analysis under the DSM-IV by hitting all five axes, things like this, Doctor, doesn't that make you feel that your evaluation is deeply flawed?

A. No. I do not feel that my evaluation is deeply flawed. I have a great deal of experience working with schizophrenic patients, I have considerable experience working with forensic science. The kind of problems that Mr. Clark presents with are classic for schizophrenia. There is very little doubt about that in my mind. And so, no, I do not think in any way my report is deeply flawed.

Q. And, Doctor, you just explained the point I'm trying to make here. We're not disagreeing with paranoid schizophrenia, we're disagreeing with sanity versus insanity.

Thank you.

THE COURT: Thank you, counsel.

Mr. Middlebrook.

REDIRECT EXAMINATION

BY MR. MIDDLEBROOK:

Q. You ever worked for the State of Arizona?

A. Worked for?

Q. Have you ever worked as an expert with the State of Arizona?

A. Yes.

[108] Q. And have you worked with Mr. Powell?

A. Ah, yes, I have.

Q. And have you written reports for Mr. Powell?

A. I don't recall whether I actually wrote a report for him or not.

Q. Is it a fair statement to say that as to the reports that you made, they follow a similar format as to the one that you created here?

A. Yes.

Q. And when you were telling us that you strive for objectivity, would you agree, based on your experience in the forensic world, that both the state and the defense hire you on a regular basis for your evaluations?

A. Yes.

Q. And, based on your prior work, as well as offering reports after evaluations are conducted, the state has relied on those reports for the purposes of prosecuting individuals. Is that a fair statement?

A. I'm – I'm – I mean, they haven't relied on them to prosecute them, but to answer some issue of a psychological nature in the course of their prosecution, yes.

Q. Correct. All right. I would like to talk to you about some of the records that were reviewed that Mr. [109] Powell talked to you about. You reviewed a lot of police reports and you saw how these police interviews were being conducted, especially with Eric's friends and his family?

A. Yes.

Q. Would you agree with me that as you read throughout these reports, the police are predominantly focused on Eric's drug behavior?

A. Yes. There was a big focus on that.

Q. And very minimal reflection of Terry and Dave Clark's statements to the police just as they were being put into the patrol car that Eric has a mental disease, there is almost no questioning about that with these many, many, many witnesses. Is that a fair statement?

A. It's very little, if any, that I recall.

Q. Let me ask you about this drug use. Does drugs such as marijuana and alcohol cause schizophrenia?

A. No.

Q. And the level of psychosis that you gleaned from the records and from your observations of Eric, would that be consistent with mere drug use?

A. Well, in Mr. Clark's case, I think the fact that after he was arrested and over the past three years that

he's been in the hospital or jails, it's been very clear that his psychosis has continued to be fairly [110] severe, even when he hasn't had access to any alcohol or marijuana, and I think reflects that fact that while marijuana and alcohol may have had some interaction with his schizophrenia, I don't think, you know, that it had had a major impact on making it a lot worse. Certainly didn't help any. So I think it was pretty much a neutral factor.

Q. And the statements that – well, let me just show the Judge. The statements that Mr. Powell was reflecting on in your report, he didn't read the first paragraph when he was talking about the – as reflected in your report on page four. Here it says that you noted in your report that as of 6-23-00, that he was screaming, it's all part of the experiment, and then later says, fuck you, you all fucking aliens, et cetera. I mean, clearly the day after or several days after his – or a day after his arrest, he's talking about some type of experiment that is occurring in some unrealistic fashion. Correct?

A. Reflecting his delusional thoughts, yes.

Q. The testimony about the Thorpe Park incident isn't entirely reflected in the police reports, and so I'd like to summarize the testimony as to those witnesses. They indicated that, first of all, Eric did not look right, looked like something – perhaps he was [111] under the influence or he was on something, and that after he makes these statements about – and they're varying statements as to what he actually said – that one individual, Mark Fields, recalls him – actually, they brought – he brought up the issue of police and that police may come and Eric said, F the police, you know, I'll shoot them or – and he kind of held up his hand, and Mr. Fields said, did not take him

seriously, thought it was just the alcohol talking, that was the actual testimony. Another witness, Jason Tackett, said that Eric just walked up out of the clear blue and started talking about shooting the police, et cetera, and it was apparent to him, to Jason Tackett, that Eric was not all there when he was saying that, as well.

So when you look at what was actually occurring at the Thorpe Park incident, Doctor, does it make any sense that that was some type of preface to a plan that Eric later was going to carry out?

A. No –

MR. POWELL: Judge, I'm going to object. I mean, that calls for an opinion. That's really outside the scope of his expertise, just if someone's talking about it.

THE COURT: I think it goes to the weight of the testimony. I will allow the testimony and [112] consider it for the weight it deserves.

MR. MIDDLEBROOK: Thank you.

Q. BY MR. MIDDLEBROOK: Based on your experience and your review of the evidence, was Eric even at that time capable in your mind of planning several weeks in advance what was going to happen?

A. Oh, no.

Q. In regard to plan, I know that you reviewed the 4-24 arrest, but I know that Mr. Powell in asking you questions about the night of the shooting – or excuse me – the early morning of the shooting, something to the effect that Eric had to go get a gun, as – as you recall – let me ask

you this: You recall on 4-24 that Eric was arrested for DUI and he was coming back from a senior ditch day party?

A. Yes.

Q. I'm going to show you Officer Hoyt's report, some of the items that was taken off of Eric at that time. You can see that I have highlighted the area where Officer Hoyt, with Eric coming back from a senior ditch day party, had a small pepper spray canister in his left front pocket with the safety off ready to fire, he had a metal police type flashlight, nonfunctioning one, with a fabricated tape handle creating a club between the door and driver's seat, a U.S. Army special forces switchblade [113] knife, found also in the driver's door. Also, as we look down, and I didn't highlight it, but there was a – was a bird in the vehicle which was taken by the tow truck driver, and there were bottle caps of Old English Malt Liquor, 40-ounce bottles.

Okay. Thank you, Josh.

Knowing that those were the items, does that – does that reflect on whether Eric, on the morning of 6-22-2000, in any manner was trying to carry out a plan by having a handgun on him?

A. No. I think he was afraid. I think that, you know, when he was actually in the patrol car with the police, it was my understanding that the police officer was driving and he struggled through the metal window to the point – fortunately, the officer was able to stop before some harm came to anyone. And, you know, it was a very precarious situation. His behavior was very strange and bizarre at that time.

Q. And we're talking about the April 24th arrest?

A. Yes.

Q. Let me show you one other thing about that arrest.

MR. POWELL: Judge, I'm going to object as being outside the scope.

THE COURT: Counsel, you are getting [114] outside the scope.

MR. MIDDLEBROOK: I'm sorry?

THE COURT: You're getting outside the scope.

MR. MIDDLEBROOK: They were talking about the 4-24 arrest, Judge. This is still the 4-24 arrest.

THE COURT: I know, but –

MR. MIDDLEBROOK: Okay. I'll move on. It's okay.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: There were – did you consider the fact that Eric had made threats to other people in reaching the conclusions that you did in this case?

A. Yes. Yes. He's threatened several; his mother, brother, and others.

Q. Doctor, when Mr. Powell was asking you about, again, why you did not put specific events in leading up to – or what occurred immediately prior to and after the shooting, why didn't you put that information in your report?

A. Why didn't I put it in? I don't usually recite the allegations that are made in the police reports and other similar documents.

Q. Do you feel that it's your job when you are [115] creating this forensic report to reiterate the state's case?

A. No.

Q. Are you aware that Dr. Moran in this case has told me in an interview the following, page 22 of the interview, the highlighted portion says: Do you believe there were any preparatory acts by Eric in setting up this shooting? And he states: I don't know.

A. Yes, I was aware of that.

Q. So even the state's expert doesn't believe that Eric was in any manner trying to set up this shooting?

MR. POWELL: I'm going to object on hearsay grounds.

THE COURT: Causes some speculation for what somebody else is going to say.

MR. MIDDLEBROOK: I will move on.

THE COURT: Okay. Thank you. Sustain the objection.

Q. BY MR. MIDDLEBROOK: I'd like to talk about the GAF scoring that Mr. Powell discussed with you at length. Let's – let me see if I can find – oh, there it is. As we look at this GAF score – first of all, is GAF intended to be used as a tool by a mental health provider to measure the extent or the depth of a [116] delusion?

A. No.

Q. Is it an – is there any type of accuracy – simply because we try to make numerical scores of things, is there any type of accuracy to it?

A. Um, you know, you could just as easily use some, you know, just language, mild, moderate, severe, with qualifiers. Its really just a very simple kind of scale to gauge someone's overall level, overall level of function.

Q. Can someone – if you as a clinician, you are admitting a patient, is it simply when you do it at that point, just a snapshot of what that person is doing at that moment in time?

A. The GAF score?

Q. Correct.

A. It is either used as a snapshot at that time, in recent past, or you say highest level of functioning in GAF in the score in the last year was whatever, so sometimes it's used that way to communicate, you know, the level of functioning of individuals among professionals.

Q. But as we look at these behaviors, can these behaviors that are reflected in the GAF score change rapidly?

[117] A. Oh, yes. I mean, they do. So you're trying to look at, you know, the – often the level of functioning over a period of time, not just, you know, that one juncture.

Q. Okay. And then when were talking about the GAF scores, for example, the fact that you may admit a patient, for example, and they have a GAF of 30, 31, does that mean that within moments if they were, for example, to

attack an orderly, that their GAF score would immediately drop?

A. No, not usually. And it's just not usually used that way.

Q. There's no correlation to do it that way?

A. No. It's not that kind of precision instrument in any way.

Q. Mr. Powell wrote up here the words "never," "probably bizarre," "probably did not know acts were wrong." What he left out of significance of that last sentence is, don't you indicate in there in the very last sentence, there is considerable evidence that indicates Mr. Clark probably did not know his acts were wrong at the time of the alleged offense?

A. Yes.

Q. And when we talk about inference, we're talking about inferences made from the evidence that was [118] presented to you?

A. Yes.

Q. And the observations, your evaluation process?

A. Yes.

Q. So we have to add here considerable evidence.

There was a lot of discussion about the Clarks making statements to the effect that when they left Eric at the movie, he was normal, or words to that effect. I would like to tell you what their testimony was yesterday in summary, and that was when they used the word "normal," they meant normal for Eric at that time; that he – I

believe Mr. Clark indicated that he was constantly paranoid and that it was a constant factor of him doing odd things. Mrs. Clark basically said the same thing. Also, what you didn't have, because I just received a transcript in the middle of this trial, was Carden Hakes's testimony, and I believe I forwarded that transcript to you where he indicates yesterday in testifying, that when he saw Eric at the Harkin's Theater, that he did not look normal. He looked like he might have been under the influence of something.

When you bear that in mind, Doctor, does it indicate to you in any manner that Eric was not going – could not be predisposed to violence simply because of his appearances at that time?

[119] A. That's correct.

Q. I would also like – if you review the records, as well as the testimony in this case, that minutes before this shooting occurred, Mike Greenway testified that Eric's eyes were wild like or wild. Susan Rinck, in her statement to the police, indicated there was something wrong with his eyes or there was a wild look in his eyes. Again, was that reflective of Eric's propensity or and/or likelihood that he – a violent act could occur?

A. I think it's more reflective it's another common kind of symptom seen in schizophrenia and more commented on by the family, he would like look through you, stare through you. As is often seen with schizophrenics, they don't have good eye contact with the people that they're talking to. They're staring beyond you or at walls or at something else. So I think it's reflective in schizophrenia. And going back to what we talked about earlier, the violence associated with schizophrenics can be totally

unpredictable, come out of the blue, be completely unexpected. So you couldn't tell just because he looked, you know, wild-eyed or odd what he was going to do next.

Q. And that leads more or less to my final question. Doctor, when you indicate in your opinion that [120] when you considered the evidence both before and after Eric's arrest or involvement in this shooting, was there ever windows of lucidity that Eric ever experienced during this time?

A. Not that I could find, no.

Q. And is it apparent to you that his delusions were continuous and chronic?

A. Yes, they are. They continue today.

Q. And when you interviewed him this morning?

A. Yes.

Q. Still existing?

A. They are still present.

Q. Thank you, Doctor.

MR. POWELL: Your Honor, may I have a bit of follow-up to straighten out some confusion?

THE COURT: It works both ways.

MR. POWELL: Absolutely, Judge. It's something Mr. Middlebrook didn't have personal knowledge of.

FURTHER CROSS-EXAMINATION

BY MR. POWELL:

Q. Doctor, we've worked, I don't want to say together, but we've worked on a common case in the past, haven't we?

A. Yes.

[121] Q. And I can remind you it was State versus Corona, a first degree murder in Yuma?

A. Sure. Okay.

Q. And in there you were actually acting as a defense expert, were you not?

A. Yes, I was.

Q. You were hired by Mike Teller. (phonetic) Correct?

A. Yes.

Q. You were not hired by the state?

A. No.

Q. Okay. And I –

A. I may have been court appointed originally in that case. I don't recall.

Q. Okay. I don't recall either. But, actually, I got to cross-examine you, much like I did today, in that case?

A. Yes.

MR. POWELL: Okay. I just wanted to clear that up, Judge.

THE COURT: Thank you.

Doctor, thank you for coming today. We do appreciate you being here. You're excused.

* * *

(13)

Supreme Court, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

No. 05-5966

In The

# Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner,*

vs.

STATE OF ARIZONA,

*Respondent.*

**On Writ Of Certiorari To The Arizona Court Of Appeals**

## JOINT APPENDIX
## VOLUME II, PAGES 105 TO 355

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**Petition For Certiorari Filed August 17, 2005**
**Certiorari Granted December 5, 2005**

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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Case No. CR 2000-538 |
| ERIC MICHAEL CLARK, | ) | |
| Defendant. | ) | |

REPORTER'S TRANSCRIPT
OF
BENCH TRIAL PROCEEDINGS
DAY 10

August 26, 2003
9:08 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

* * *

[4] THE COURT: Counsel, you may call your next witness.

MR. POWELL: Dr. John Moran, your Honor.

THE COURT: Sir, if you would please come up here to the clerk station, raise your right hand and be sworn.

(Whereupon, the witness was duly sworn by the Clerk.)

DR. JOHN MORAN

called as a witness herein, having first been duly sworn, was examined and testified as follows:

THE COURT: Sir, if you would please walk around there and be seated. Sorry we don't have a bailiff this morning.

Are you going to be using the –

MR. POWELL: Not for a bit, Judge.

THE COURT: Okay. Thank you.

[5] MR. POWELL: It just takes a while to warm up.

THE COURT: Never mind. Thank you.

DIRECT EXAMINATION

BY MR. POWELL:

Q. Good morning, sir. Will you tell us your name please.

A. John Moran.

Q. And your occupation?

A. Psychologist.

Q. And where do you work?

A. I'm in private practice in Phoenix, Arizona.

Q. And could you tell us a bit about your practice?

A. My practice is primarily forensic at this point. I would say that 75 percent of my work is related to performing evaluations that are to be used in a legal setting. These include criminal evaluations, such as the issue of insanity, domestic relations cases, evaluations of sexually violent persons, Rule 11 evaluations or competent to stand trial. Remaining 25 percent of my work I think is best described as a general clinical practice.

Q. Would you please tell us your educational and professional background?

[6] A. I received my undergraduate degree at the University of Notre Dame. I did my graduate training at the University of Maryland in the department of clinical psychology. I completed my internship in clinical psychology at the University of Florida Teaching Hospital. Since then, I have participated in continuing education programs.

Q. And how long have you been practicing in the Phoenix area?

A. 20 years.

Q. And can you please tell us the licenses you have and accreditations you possess?

A. I'm licensed as a psychologist in the District of Columbia, the State of Maryland and the State of Arizona.

Q. And since when in Arizona?

A. Since 1984.

Q. And have you testified in superior courts in the State of Arizona regarding forensic issues?

A. Yes, I have.

Q. And since when, approximately?

A. Maybe 1990.

Q. And, again, it would be the areas you have described earlier?

A. Yes.

[7] Q. I understand in Maricopa County has a list put together by the Superior Court judges of individuals who are admitted to do certain types of evaluation?

A. Yes.

Q. Competency, insanity. Are you a member of that list?

A. Yes, I am.

Q. And how long have you been on that list?

A. Probably 12 to 15 years.

Q. Would you please tell us what a forensic psychologist is?

A. A forensic psychologist is a psychologist who practices psychology for the specific purpose of utilizing for the specific purpose of providing the Court a psychological perspective the advocation to legal matters.

Q. And, again, you have qualified as an expert in numerous courts?

A. Yes, I have.

Q. Are you knowledgeable, sir, as to the Arizona law regarding insanity?

A. Yes, I am.

Q. And that would be A.R.S. section 13-502?

A. Correct.

Q. And have you testified in insanity cases in [8] the past?

A. Yes, I have.

Q. Were you asked to perform any type of mental health evaluation with regard to the case of State versus Eric Clark in Coconino County?

A. Yes, I was.

Q. When were you first retained, if you recall?

A. September of 2000.

Q. And was that by the Coconino County Attorneys Office?

A. Yes, it was.

Q. And did you author a final report dated July 22nd of this year?

A. Yes, I did.

Q. What I'd like to do, sir, is ask you to kind of go back with me. Let's go back and see what you commonly do and did in this case in order to prepare a written evaluation for a court.

A. Okay.

Q. Could you please tell us what the normal setup would be as far as your efforts?

A. Typically, there's a telephone consultation or in-person meeting with the attorney who is retaining me. The attorney provides an overview of the case, provides documents that are reviewed before meeting with the [9] defendant. I then meet with the defendant, either one or two times, I administer the defendant psychological tests, I sometimes talk with collateral witnesses for sources of data and prepare a report.

Q. Would it be fair to say that's pretty much how the evaluation came about regarding the defendant here today?

A. Yes, sir.

Q. Did you rely on any treatises or literature in arriving at your evaluation and conclusions here?

A. Yes.

Q. What did you rely upon?

A. Well, certainly, I relied upon the totality of the training that I have had; in addition, I consulted, reviewed a couple books on insanity evaluations, in particular, one by Dr. Rogers and another by Dr. Moen. (phonetic)

Q. And we'll talk about the DSM-IV-TR in a while, but you did rely upon that also?

A. Yes, I did.

Q. Did you consult with any other professionals regarding issues arising in this case?

A. Yes, I did.

Q. Who else did you consult with?

A. Jack Potts is a psychiatrist in Phoenix. [10] Early on in the case I consulted with a psychologist by the name of Alan Goldstein, who is in New York, and those were the only two consultations that I had.

Q. Now, you were not involved in the competency issue involving the defendant, were you?

A. No, I was not.

Q. Let's talk about the review of the case file. What types of things were you presented with by the county attorneys office or by my office after we assumed the prosecution?

A. I was provided information about the scene of the crime, interviews of the defendant's family, of associates or friends of the defendant, including teachers and former basketball coaches, youth leadership, youth group leaders, I was provided videotapes of the defendant from the night that he was arrested – or morning that he was arrested and also of the arrest that he had in April of 2000. I was provided copies of some of the news coverage that was generated around the time of his arrest. I was – I reviewed copies of experts – other experts who evaluated the defendant, either for the competence issue or regarding the sanity issue. I also received copies of police reports, specifically those related to his conduct at the time of his arrest.

Q. Let's talk about that for just a moment. Did [11] you feel that it was important to evaluate police reports involving the crime itself, the murder of Officer Moritz and the ensuing manhunt, for lack of a better word, and arrest?

A. In this type of case, it's the information that has to do with the events surrounding the crime that's the most important information to review.

Q. And did you take a good amount of time to go through those issues and those reports?

A. Yes, I did.

Q. Now, in your report dated 7-22-03 you listed a number of items that you had evaluated and reviewed. Correct?

A. Yes.

Q. Since then, by documents dated August 25th, '03, did you supplement that on things you have reviewed since the preparation of the evaluation?

A. Yes, I did.

MR. POWELL: Judge, what I'd like to do is add this into the defendant's notebook. It's a supplement to the doctor's report. I don't know if you want me to have this marked separately or if we could just stipulate it in.

MR. MIDDLEBROOK: That's fine, Judge. I mean, I just got it this morning, but go ahead.

[12] THE COURT: Why don't we have it admitted separately so it can be identified.

MR. POWELL: May I approach, your Honor?

THE COURT: You may.

Q. BY MR. POWELL: Doctor, I'm going to hand you what's been marked as Exhibit Number 99 and ask you if you recognize that document.

A. Yes, I do.

Q. What is that?

A. This is a letter I prepared to you which lists the documents that I have reviewed subsequent to my report submitted on July 22nd, 2003.

Q. And you presented that to me last evening, did you not?

A. Correct.

MR. POWELL: Your Honor, move for admission.

MR. MIDDLEBROOK: I have no objection.

THE COURT: It will be admitted. Thank you.

Q. BY MR. POWELL: Let me specifically go through and ask you about a couple – a number of areas. You reviewed all the police reports that were submitted to you?

A. Yes.

[13] Q. You're familiar with the Title 36 proceeding?

A. Yes.

Q. Reports generated, transcripts generated?

A. Yes.

Q. The Aspen Hill report?

A. Yes.

Q. From 1999, I believe?

A. Yes.

Q. Dr. Kassell's reports?

A. Yes.

Q. His Rule 11 testimony?

A. I don't believe I reviewed that.

Q. His defense interview?

A. Yes.

Q. Dr. Di'Bacco, his reports?

A. Yes.

Q. His interview?

A. Yes.

Q. Arizona State Hospital restoration program records?

A. Yes.

Q. Complete Coconino County Jail records?

A. Yes.

Q. Maricopa County Jail records?

A. Yes.

[14] Q. Dr. Parrish's complete set of reports?

A. I believe so.

Q. And her interview with myself?

A. Yes.

Q. Dr. LaWall's interviews?

A. Yes.

Q. And reports?

A. Yes.

Q. Or report, I should say.

Did you also view any movies in preparation for doing your evaluation?

A. I reviewed the videotape simulation of the events the day of the shooting.

Q. Any motion picture type video, also?

A. Oh. Yes. I viewed the movie Shaft, the movie Gone In 60 Seconds, and the movie The Matrix.

Q. And why was it that you viewed those three movies?

A. Because the defendant was reported to have had an obsessive interest in The Matrix and he had viewed the movies Shaft and Gone In 60 Seconds the night before the crime.

Q. Did you listen to any compact disks?

A. Yes, I did.

Q. What did you listen to?

[15] A. Dr. Dre.

Q. D-r-e?

A. Yes, D-r-e.

Q. And that's hyphen 2001? Is that the title of it?

A. I believe so, yes.

Q. And why was it that you listened to the CD?

A. That was marked in evidence as being the compact disk CD in the player in the truck when the truck was confiscated.

Q. Did you find anything of interest while listening to that CD?

A. Yes, I did. That CD was, I think, fairly characterized as a rap CD, and it contained many antisocial attitudes as part of the lyrics.

Q. Any reference to police officers or cops?

A. I believe that it did. I think that it says something to the effect of fuck the cops.

Q. Have you been shown a copy of the state's exhibit notebook?

A. Yes, I have.

Q. And the defense exhibit notebook?

A. Yes, I have.

Q. And you've reviewed those?

A. Yes.

[16] Q. And I know we've left some out. But is that a pretty good hunk of what you've had to review in anticipation of your report?

A. I think it's significant to add that I did view Mrs. Clark's journal, 19-page journal you provided last night.

Q. And that was just given to you last evening?

A. Correct.

Q. By myself. Did you have an opportunity to interview the defendant?

A. Yes, I did.

Q. On how many occasions?

A. Twice.

Q. And the dates of those?

A. June the 27th, 2003, for approximately 3.25 hours, and on July the 11th of 2003 for approximately 3.25 hours.

Q. Were those productive interviews, in your estimation?

A. Yes, they were.

Q. Please tell us about the interview 6-27-03, approximate time, where it took place, who was present.

A. It was at the Arizona State Hospital in Phoenix. And it's the restoration unit at the hospital. It occurred in a private room. Probably it would have [17] been an office. Present at the interview were the defendant, myself, and David Weinstock, who is the Ph.D J.D. post-doctural fellow who was along both to provide some administrative assistance and observe as a trainee.

Q. Now, did Mr. Weinstock or Dr. Weinstock, I guess I should say, did he participate in the evaluation portion?

A. I don't think that he said anything to the defendant at all in the first interview. In the second interview

perhaps he conveyed to me two or three questions that he'd like to have asked.

Q. And please tell us about the interview on June 27th.

A. The interview on June the 27th that we began by explaining the legal context to the defendant and making sure that he appreciated that I was retained by you, that what he said to me was not confidential, that he understood the purpose of the interview. I asked him if I could tape record it and he consulted with his attorney and declined that. That interview more or less followed a chronological history, so we began with his early childhood health and development and went through the various aspects of his history, including health, mental health, drugs and alcohol, school participation, athletic participation, his experiences in the family [18] large, his experiences in the workplace and up to the events that immediately preceded the shooting on June 21st of 2000. At that point, he told us that he was not present at the shooting on June the 21st of 2000 but, rather, he had spent a day in Page, Arizona, with a girl by the name of Sarah that he had met. So we talked to him some about that and got a better understanding of what he meant and what he had to tell us. And that was pretty much the scope of that interview.

Q. Let's go back just a little bit. You said you inquired of his family. Did – at any time during this interview did he mention aliens?

A. I believe he did.

Q. And what was the context of that, if you recall?

A. I started to ask him about the reports of him flicking off people at school and shaking a pen at them, and he – and then I asked him about why he was putting fishing line in his room and in his car, and he responded, I didn't want anyone messing with that. And I asked, who did you think would do that? And he responds, aliens, but I think the aliens look like people, terrestrial sophisticated people.

Q. Was there any follow-up on that comment about aliens?

[19] A. Yes. We talked about aliens quite a bit. I could read part of my report if you'd like me to.

Q. Certainly.

A. Okay. I asked him when he first had the idea about aliens –

MR. MIDDLEBROOK: Excuse me. I'm sorry, Doctor. Can you tell us what page?

THE WITNESS: Yes. I'm on page 34, line 14. Actually, line 13. So I had asked him when he first had the idea, and he responded about the time I decided to get home schooled and prepared for Y2K. I thought one of the reasons I was put in jail was because the aliens hated me. I thought that Flagstaff was full of aliens, that my mother, father, sister and brother were aliens.

Question: What kind of aliens?

Response: From a different planet.

Question: Why were the aliens here?

Response: I did not know why or why I think they are still here. I still think there are aliens that look like human beings.

Question: Do you think I'm an alien?

Response: You could be. Are you? No.

Is Dr. Weinstock?

No.

[20] Question: Were the – what are the aliens doing?

I don't know. Living like human beings.

Question: Why are they here? To take over? To expand their territory?

Response: I don't know what I thought then. Now I think they're expanding like maybe to do trades for stuff, maybe like sugar and broccoli.

Question: What do you best recall about what you were thinking then about why the aliens were here?

Response: I don't know. Probably something except they wanted to kill me.

Question: Why think that?

Response: I don't know. I did not think that anymore, but I think that's part of the reason why I'm –

Question: Why were you thinking that they wanted to kill you?

And then I noted that there seems to be a non sequitur there, because I asked that question and there was no

response. And so this morning I went to my notes, transcription of my interview notes from that day. And, in fact, what the transcription reads is:

Question: Why were you thinking that they [21] wanted to kill you?

Response: Yes, I thought they wanted me dead to poison me through my clothes and my food. At the Coconino County Jail they poisoned me badly. I don't know if it was an alien or human being. That's – that's why I went to the infirmary. I was peeing on myself. I was real sick for three months from the poisoning but a little bit sick for an entire year. I got rings on my toes but I was very badly sick only for about three months.

Q. BY MR. POWELL: Okay. Let's end it there. I know he goes on but let me ask you, where was this – the symmetry of the interview, where was this compared to the Sarah story?

A. This is about halfway through and the Sarah story was about three-fourths of the way through.

Q. And what did he tell you precisely about the referring to the – as the Sarah story?

A. He told me that after his parents left the movie theater, that he went back into watch Gone In 60 Seconds, and that he met a girl who was there by herself by the name of Sarah and she said – she asked him if he wanted to go to Page with her for the day, and they agreed. So after the movie, he and Sarah separated and she went to her house to get her bathing suit and such, [22] he went over by the Wal-Mart bus stop where he was going to wait for her to pick him up. And she picked him up at 1:30 in the morning. They then drove to Page. They spent the day

on the beach sunning themselves. They were on the beach all day, except for that they went to McDonald's for lunch. That – that he didn't get Sarah's last name. He had her telephone number which was written on a piece of paper that was in his pants but he was arrested but he believes the police lost that. And he wasn't able to identify the kind of car but I think he was – it was a white car.

Q. Did he mention his arrest?

A. He said that they stayed – they came back, that they left Page as the sun was going down, and when he came back, that she dropped him off around 8:30. He was walking home and suddenly the police arrested him and he didn't know why.

Q. Did you confront him with any of the physical evidence against him showing that he was, in fact, the killer?

A. No, I didn't.

Q. Tell us about the – does that pretty much conclude the first interview with the defendant?

A. Yes.

Q. What about the second interview on July 11th, [23] I believe.

A. The interview on July 11th focused more on the psychiatric symptomatology and questions about the aliens, about whether or not they can insert thoughts in his head. I asked him about the movie, Matrix, whether he thought it was true. Asked him why he was turning up his TV at home, why he would let the water run, why the burglary tools were in his car, about the jewelry in his car.

I asked him if he had been doing drugs. I asked him whether his brother had been abusive to him. I asked him some more about the aliens. I asked him about his suicidal thoughts. Then I talked with him some about his perspective on the advantages and disadvantages of pleading innocent as opposed to pleading guilty except insane.

Q. Did he appear to understand the difference?

A. Yes, he did.

Q. During the two conversations you had with him, what did he tell you about his drug use?

A. He told me that he first experimented with drugs when he was in the 7th grade. And there was approximately a three-month period when he would do drugs. He would smoke marijuana on the weekends in the 7th grade and then he stopped. That then in the 9th grade, in the summer of the 9th grade, he began to use [24] marijuana on a daily basis and to drink alcohol on weekends to the point of intoxication. That once he got his car, which would have been September of '98, his marijuana use increased even more. He was smoking it on average three or four times per day. That he would – he didn't like to smoke before school but sometimes he did. That he would smoke at lunch time. He'd smoke after school. That on the weekends he often drank alcohol to the point of intoxication. He said he would get drunk but he wouldn't pass out. Later on, he acknowledged that he sometimes would vomit.

Q. What type of tests were administered to the defendant?

A. The Minnesota Multiphasic Personality Inventory. That is a standard test used by psychologists to assess personality and credibility to some extent. It's 576

questions that are in a true/false format. The responses that the person gives are compared to other people who have taken the test and they are matched in terms of what groups the responses fit into as a way of providing a characterization for the person who took the test.

I gave him the structured interview of the recorded symptoms, which is a test designed to assess for malingering, and I gave him the Paulhus Deception Scale, [25] which is another test to assess his credibility.

Q. And could you take us through the results of the – those three tests in order please beginning with the MMPI?

A. Okay. On the MMPI consists of what's called nine clinical scales and three validity scales, and that one is part of the test he responded to items claiming to be unrealistically virtuous; in other words, he would not admit that he has the common foibles that most people have, such as that their table manners are better in restaurants than they are at home, that they occasionally lose their temper. But in spite of wanting to appear to be proper, he did acknowledge and endorse a number of items which were – showed unusual thinking. That overall, the clinical scales, his results were similar to individuals who tend to be quite disturbed psychologically. That he seems to be extremely angry and suspicious that others are taking advantage of him. He's overly sensitive to criticism, aloof, detached and regularly moralistic. He reacts to threats by projecting and rationalizing. He takes little responsibility for his problems, instead, blaming others and harboring grudges. Such clients may be overtly paranoid with delusions and clear ideas of reference. He's endorsed a number of extreme bizarre thoughts, suggesting the [26]

presence of delusions and/or hallucinations. Apparently, he believes that he has special mystical powers or special mission in life that others do not understand. He tends to be rigid in relationships and has a closed attitude towards others's view points and probably has disturbed social relations.

Q. Thank you. And you say there was also a deception scales?

A. Yes.

Q. And those were?

A. The Paulhus Deception Scale presented pretty much the same results as the MMPI, which is that – that he tends to present himself as being socially virtuous and he denies the foibles that most of us would acknowledge.

The second half of that scale he responded incorrectly to several of the items, and so I couldn't score.

On the Structured Interview of Reported Symptoms, he – one of the rare symptom scale, he endorsed he makes a very atypical presentation of psychiatric symptoms indicating a tendency – with a tendency to endorse very severe symptoms often with psychotic contents.

The – his score on this scale is probably [27] feigning range, so he appears to be exaggerating the intensity of his symptoms.

A second component of that test measures improbable or absurd symptoms, for example, do you have any unusual beliefs about automobiles, so that would be an absurd symptom, and his score on this subscale is in the honest range.

On blatant symptoms or symptoms that an untrained individual could identify as indicative of a major mental disorder, such as do you have any major problems with fighting evil forces, his scale – his score on the – the subscale is in the indeterminate range, that is out of honest range, but below the range of definitely feigning.

On subtle symptoms, so these are symptoms that untrained individuals would see as everyday problems and not indicating a mental illness. His score is at the high end of indeterminate range. So selectivity of symptoms.

THE COURT: Sir, I don't know what that means. Tell me what that means.

THE WITNESS: Indeterminate range?

THE COURT: No. The high end.

THE WITNESS: Okay. On the scoring for the text it's broken into three ranges, one is the honest [28] range, two is the indeterminate range and three is the obviously or clearly dishonest range. So he's at the high end of indeterminate range, which is meaning that you can't absolutely conclude that he's being dishonest but it's getting in that direction.

THE COURT: I see. Thank you.

THE WITNESS: Yes. Selectivity of symptoms, this is – suggests some individuals are not selective or indiscriminate in their endorsement of psychiatric symptoms; in other words, they are going to endorse symptoms that don't really go together as professionals understand them going together. And his score was in the indeterminate range. And severity of symptoms are that, this asked whether or not he's reporting an unlikely number of

symptoms with extreme or unbearable severity. On this scale he scored at the high end in indeterminate range, again, suggesting he may be exaggerating paranoid. And then on observed symptoms versus reported symptoms, he was in the honest range.

Then there are supplementary scales. Do you want me to go through those, as well?

Q. BY MR. POWELL: I don't believe we need to do those yet at this time.

Does that conclude the testing?

A. Yes, it does.

[29] Q. And overall thoughts as a result of the testing?

A. I thought that the testing supported that he's – the diagnosis of schizophrenia, paranoid type, that it – it supports ruling out malingering as a problem.

Q. Malingering is eliminated, is it not?

A. Yes.

Q. Let us go back. You've said you've interviewed the defendant, you've done the testing, you've also mentioned that you normally interview collateral witnesses.

A. Yes.

Q. Who else did you interview in this case?

A. I interviewed Mr. and Mrs. Clark, Gentry Clark and Aileen Clark.

Q. Okay. Anything significant with Aileen?

A. Not really. She did talk of one incident when her brother more or less erupted at her when she was playing with a cat toy and it irritated him.

Q. How about Gentry, anything of significance?

A. Gentry acknowledged that Eric sold drugs.

Q. Anything else with regard to mental health from Gentry?

A. No.

[30] Q. The father?

A. Well, Mr. Clark provided background information, filled in the details regarding some of the unusual behavior that he had observed. He also clarified the events that occurred on the evening before the shooting. And that was helpful to me.

Q. And when was his interview? When did you interview the father?

A. July the 11th, 2003.

Q. And the mother, when was she interviewed?

A. Same day, July the 11th, 2003. Like father, she helped to fill in the gaps regarding the background information, the psychosocial history, the details of his unusual behavior, and that the events that preceded the night – that occurred the night before the shooting of Officer Moritz.

Q. Were they helpful to you?

A. Yes.

Q. Did they appear to try to help their son?

A. Yes.

Q. With information they provided you?

A. Yes.

Q. On that day, July 3rd, (sic) '03, did you hear anything about Aaron's story?

A. No, I did not.

[31] Q. When is the first time you heard anything about Aaron's story?

A. I think it was at the end of last week in a telephone conversation with you.

Q. And I explained to you briefly about the Flagstaff being the platinum city, being inhibited by 50,000 aliens, 1,000 non aliens. Aaron was kind of a hostage because he has the keys to the city. Did I explain all that to you?

A. Yes.

Q. Had you heard anything similar to that before?

A. No, I had not.

Q. After you have your – well, let me ask you if there's anything else you have done of significance that the Court should know about before you sat down and actually started your evaluation and the construction of your report?

A. I think that pretty well covers it.

Q. So you reviewed the file, movies, the videos, the CD, interviews of the defense and family members, did the consultation with the experts, performed and graded the tests. That pretty much covers it?

A. Yes. I had some conversations with you or when I first was – accepted the case I had some conversations with Mr. Rozema.

[32] Q. Now, in reaching your evaluation and preparing a report for the Court, this is where the DSM-IV-TR comes in?

A. Yes.

Q. And how was it that learned treatise was used?

A. Well, I guess I'd like to state even at this point that the critical issue is whether his – the mental state of the defendant at the time of the offense, not his diagnosis, but establishing a diagnosis can be helpful as a – a way of understanding what his mental state might have been at that time. So the DSM-IV-TR is the diagnostic and statistical manual of mental disorders posed by the American Psychiatric Association, so it is a compendium of disorders and the diagnostic criteria that can be used to determine if a disorder is present.

Q. Now, in the world of insanity, that would be the first step?

A. Yes.

Q. First of two?

A. Yes.

Q. And how did you go about using the DSM in this case?

A. I entertained a number of hypotheses about what the diagnosis might be and systematically looked at the

DSM-IV as to whether or not the defendant's qualified [33] for those diagnoses. And as I combed through the material, I kept in mind what the criteria were trying to establish with more certainty what the diagnosis was. And, eventually, I arrived at a diagnosis as I put it in my report.

Q. Is there a bit of a process of elimination?

A. Yes.

Q. And, Doctor, how is it that a diagnosis is arrived at? I know you eliminate certain ones, but when you finally determine what your diagnosis is going to be, what is that based upon?

A. Well, it's based upon the configuration of data, look at the data and various sources of the data, and under a specific diagnosis, say, for example, schizophrenia paranoid type is – DSM-IV is going to say, person must have two out of the following five – meet two out of the following five criteria, whatever it is. And so you look and say, does the person meet this criteria? If so, where do they meet it? And if they meet it, then a diagnosis is established.

Q. With regard to the – well, these are symptoms of diagnoses. Would that be –

A. Yes, of the disorders.

Q. So you're looking at the symptoms of the disorders in order to make a diagnosis?

[34] A. Correct.

Q. And we've heard talk about the five axes?

A. Yes.

Q. Please explain that.

A. The DSM-IV diagnostic system involves five axes; and Axis I is for the major mental illness, Axis II is primarily for personality disorders, Axis III is to indicate if there are any medical conditions which are contributing to the presence of a major psychiatric illness, Axis IV is to specify what are the stressors that may have been contributing to the presence of the mental illness, and Axis V is a global assessment of functioning that is a rating of the person's overall level of function to either on the day that the diagnosis is given, it can be used to predict what a person's level of function would be if treated successfully.

Q. Did you perform all five testing for all five axes?

A. Yes, I did.

Q. Why would you do all five?

A. I believe that's the standard called for by the DSM-IV.

Q. Would there be exceptions where selected axes should be done and selected ones should not be done?

A. I don't believe so in a legal setting.

[35] Q. How do you make the Axis I determination? And if you could tell the Court again, what does that report?

A. Axis I, it reports the presence of a major psychiatric illness or disorder, and so that's where you go through the different disorders that are listed in the DSM-IV that are relevant to Axis I. You compare the signs and symptoms of any disorder that you see in the records or the testing and you compare that to the signs and symptoms

of the various disorders and determine whether or not one of those – there's a fit for the individual with the disorder.

Q. And were you able to do that in this case?

A. Yes, I was.

Q. And is that where you reached your diagnoses of schizophrenia paranoid type?

A. Yes, it is.

Q. Let's move to Axis II. How does Axis II work?

A. Axis II is personality disorders. Personality disorders are enduring and pervasive patterns of functioning that affect the individuals adversely across a variety of settings, such as family life, work life, school life, physical function. The DSM-IV lists I think it's nine different personality disorders, and then it also provides for what's called personality disorders not otherwise specified, that is that the person has the [36] traits or features of a personality disorder and seems to have personality problems that are broadly disruptive to their functioning but they do not fit into any one of the specific diagnostic categories listed in the DSM-IV.

Q. All right. Are there situations where an Axis I diagnoses is so prevalent overreaching that you can't even get to an Axis II?

A. Yes, there is.

Q. And did you feel that was the case in this situation?

A. No, I did not.

Q. Please explain that to the Court.

A. Well, as an example, one of the personality disorders in the DSM-IV is a schizotypal personality disorder which is characterized by oddness of thoughts, eccentricities of behavior, difficulty with interpersonal relationships. But it's different from the schizophrenia because it's not characterized by hallucinations or delusions. But if a person has schizophrenia, you'd also expect him to have oddness of behavior, oddness of eccentricities of behavior, oddness of thoughts and difficulty in interpersonal relationships. So you would not diagnose both of those. You would say that the schizophrenia incorporates or adequately covers those features of the personality disorder.

[37] Now, in this particular case, I think that the defendant had features of a personality disorder that preexisted or were what we call premorbid to the onset of the schizophrenia, that that was reflected in both his oppositional behavior, which is documented to have begun as early as in the 5th grade. I think its reflected in his selling or attempting to sell marijuana when he was in the 7th grade.

Q. And did you have a specific diagnoses there?

A. I think I just diagnosed him with personality disorder, not otherwise specified.

Q. Not one of the nine stated illnesses but the other?

A. Correct.

Q. And, again, that pre-dated, it was premorbid to the diagnosis of the Axis I?

A. Yes.

Q. Axis III, please explain that to us.

A. Axis III is the presence of any medical disorders which might bear on the psychiatric disorders; for example, if a person has hyperthyroidism. But in Mr. Clark's instance, I don't know of any medical conditions that are relevant.

Q. Did you inquire as to that area?

A. Yes, I did.

[38] Q. And that was through the defendant and his parents?

A. Yes. And record review.

Q. At times that can be a very telling diagnoses?

A. Absolutely.

Q. Axis IV, stressors, please explain that to us.

A. Psychosocial stressors are the stressors bearing on the individual which may be responsible for the presence of the psychiatric illness, so that can include things like economic problems, housing problems, family problems, legal problems, health problems, inadequate access to the health care system, those types of things.

Q. And did you inquire with regards to the defendant in this case as to those types of stressors?

A. Yes, I did.

Q. What did you find?

A. That the only problems that he was having in addition to his mental health problems was probably relationship problems.

Q. Explain that please.

A. Well, I diagnosed him to have schizophrenia paranoid type. That's a stress, but in addition to that or maybe as a product of that he was having problems in that he was socially isolated but he was not having [39] problems in that he had a good place to live, he had a good social support system, he had adequate – he had adequate finances.

It just comes to mind that I also wanted to add that in addition to the schizophrenia paranoid type, I also diagnosed him with alcohol abuse and with marijuana abuse on Axis I.

Q. I should have pointed that out. Before we get into V, let's go back and explain to the Court when you do this evaluation, at what stage of the defendant's life are you looking at, are you evaluating?

A. Well, for this evaluation, I was asking what was the diagnosis in the diagnostic formulation for the defendant the day of the shooting.

Q. And that is generally accepted in your professional field such an evaluation?

A. I think you can if you specify that that's what you're doing.

Q. So would this have been – I know we can't put hours on this, but is this immediately before the shooting? Is this 24 hours before the shooting? Or is there any range you can provide?

A. I was – in my mind I was thinking up to the moment of the shooting.

Q. Let's go onto Axis number V. Please explain [40] that to us.

A. Well, Axis number V, the DSM-IV provides the GAF scale as a way of describing the individual's global functioning at the time of the diagnosis is rendered. And the GAF scale is functions. It's describing both the intensity or severity of symptoms and the overall behavior of the individual. And it defines 10 different levels of functioning on a scale of zero to 100 with each 10 numbers indicating a different level of functioning. So you go from somebody who is healthy, is free from symptoms and rarely has trouble coping with their life, with their problems in their life, and they would be rated say a 95, to somebody who is an obvious danger to themselves and others, and they'd be rated as below a 10.

Q. And that is directly from the DSM-IV-TR, the scale itself?

A. Yes, it is.

Q. And did you reproduce the scale within your report for the Court?

A. Yes, I did.

Q. And I believe – is that on page 50?

A. Yes.

Q. And it ranks from zero, which would be inadequate information, to up to 100. Correct?

A. Correct.

[41] Q. And what was your ranking or rating of the defendant the instant before the shooting?

A. I rated him as being at the low end of 31-40 decile.

Q. And what does that play out to be in using the chart from the DSM?

A. Well, to use this chart, you're supposed to rate either the worst either the severity of the symptoms dimension or behavior symptoms dimension. And so as I understood Mr. Clark's functioning at that time, he was having some impairment in reality testing, for example, he thought that food was poisoned, might be poisoned or the water might be poisoned or that there was aliens living in Flagstaff, and I understood that he was having some problems in his behavior, particularly in the area of interpersonal relationships, some moodiness.

Q. Let's just look now. You said there were two facets to this, the severity of the symptom and the functioning, and you take the worst or the lower of those two?

A. Yes.

Q. And that's where you place the individual?

A. Yes.

Q. On the continuum of the scale?

A. Yes.

[42] Q. And is that how you did it in this defendant's case?

A. Yes, it is.

Q. I know during the defense interview with you it was asked why you didn't go any lower. Would you explain to us why you don't feel he belongs in the next lower area?

A. Because the next lower area, 21 to 30, says, behavior is considerably influenced by delusions or hallucinations or serious impairment in judgment – I'm sorry – serious impairment in communication and judgment, and they give examples, sometimes incoherent, acts grossly inappropriately, is suicidally preoccupied, or if they have an inability to function in almost all areas, stays in bed all day, no job, home or friends. I didn't think that the behavior that I had seen described was that severe.

Q. Now, you say you reached the lower end. Did you give a specific number?

A. I gave a 31.

Q. And when you reached your conclusion of 31 on the scale, had you known what Aspen Hill had arrived at a year before the actual murder?

A. No, I did not.

Q. Did you go back and look to confirm and try [43] and compare the two?

A. Yes, I did.

Q. And what was Aspen Hill's rating?

A. They rated him a 30.

Q. Just one point difference?

A. Yes.

Q. And that would have been in June of 1999?

A. Correct.

Q. And your rating was aimed at June of 2000?

A. Correct.

Q. Let's talk about sudden precipitous drops or rises in functioning ability. Would you like to comment on that please?

A. Yes. The – I guess I'd make three comments. One is that, well, the global assessment and functioning scale possible for a person to have a precipitous drop or a rise, that if a drop occurs you would expect it to be explainable as a response to a stressor.

The second comment I would make is that the global assessment of functioning scale is global, and that means it's looking at the overall function of the individual. And the issue that we have at hand today is a more specific question; and that is, what was his mental state at the time that he pulled the trigger.

The third comment that I would offer is [44] that the law specifies that in order to be found not guilty except insane but they must be suffering from a mental illness or defect of such severity that they can't judge the wrongfulness of their conduct. And so the question becomes, how does one quantify severity? And you can do it by saying mild, moderate or severe. Seems to be that the more specific you can be, the better, and that the GAF is both a professionally sanctioned scale for specifying behavior and it is more specific than mild, moderate or severe, but it does not answer the question of what was going through his mind at that exact time. However, it does give us some gauge or some calibration of the level of function he was at before the crime versus the level of function that he must have been at when he committed the crime.

Q. So we're not saying that this is going to answer exactly what was going through his mind at the time of the shooting, but this can give us some assistance in what led up to that, what his functioning ability was leading up to the shooting?

A. That is correct, and trying to arrive at some assessment of the severity of the mental illness.

Q. Well, is the GAF evaluation particularly helpful in certain areas, such as sexually violent predators?

[45] A. It's – I think it's useful in all areas. That's an area where it is useful, yes.

Q. To maybe change the subject just a bit, but since we're talking about stressors, would you agree that being arrested would be a stressor?

A. Yes.

Q. Incarcerated?

A. Yes.

Q. Charged with serious crimes such as first degree murder?

A. Yes.

Q. And, Doctor, you have responded to this already, but let me ask you again, once you reach a clinical diagnosis per the DSM –

A. Yes.

Q. – IV-TR, it's a clinical diagnoses?

A. Yes.

Q. Is your job as a forensic mental health expert completed at that point?

A. By no means. At that point, you have to answer such questions as, is there any relevance of the diagnosis to his behavior, and if there is relevance of the diagnosis to behavior, how did that relevance apply?

Q. And, again, you've told us you are very familiar with the insanity law in Arizona?

[46] A. Yes.

Q. And please explain to the Court what your understanding of the insanity law in Arizona is.

A. That there are two prongs that – for a person to be judged to be guilty except insane that they must have. First prong is they must be determined that they have a mental illness or defect. And the second prong is that it must be determined that the severity of that mental illness or defect is such that they were unable to understand the wrongfulness of their conduct.

Q. As a mental health professional, if you determined the defendant is suffering from a mental illness before, during and after a crime, can you infer that the second prong, which is technically not knowing the crime, the criminal act was wrong, has been satisfied?

A. No, you can't. For example, I could determine that a person is suffering from alcohol abuse, but that's the Axis I diagnosis. But, obviously, that doesn't pertain to or doesn't qualify under the law for a guilty except insane defense.

Q. What were – we have a clinical diagnoses, a person is charged with a serious offense, they have invoked the insanity defense, what is a forensic mental health expert to do at this juncture?

[47] A. They try and zero in on the mental state of the defendant at the moment of the crime.

Q. And how do you do that?

A. Well, there are several things that you want to know. The most important thing you do is you talk to the defendant. That's the main source of your data. You want to talk with the defendant. And to judge their mental state at the time of the crime, you want to find out things as simple as what had their pattern of eating been in the days – the day of the crime and let's say seven days prior to the crime, how had their sleeping been, whatever pattern of drug use and alcohol consumption had been, what – had they consumed any alcohol or drugs on the day of the crime, that when they entered into the situation in which the criminal act was performed, were they oriented to circumstances; in other words, did they have their wits about them enough that they knew that they were who they were, roughly what time of day it was, roughly what day of the week it was, did they know that the person that – in this instance, did Mr. Clark know that he was looking at a police officer. I'd want to know what his plan was at that time, that his behavior – he could assert I suppose that he didn't have any goal to his behavior, that he was a raving lunatic, as they say, and that the events that occurred were [48] purely chaotic.

But, short of that, the person or the defendant should be able to explain what the plan – their plan of behavior was, they should be able to explain what their goal of their

behavior was and what the motive of their behavior was. For example, if I had a case in which a fellow was judged to be guilty except insane when he killed his wife and he was able to describe in good detail with a lot of corroborating evidence that he believed that the Mafia were out to get him and that his wife was connected to the Mafia and that when he picked up – when she picked up the telephone, that either he killed her or the Mafia were going to come kill him, and so he did kill her and then he waited around for the police because he thought that he had committed an act which the police would understand as being legitimate self-defense.

So you want to understand what the goal is and what the motive is and what is it – ideally, we'd like to know what Mr. Clark thought he was doing when he pulled out the gun and shot Officer Moritz. Did he know he was shooting a police officer? Was he doing it because he thought that he was going to be arrested and he didn't want to go back to jail? Did he think he was doing it because he thought he was going to be arrested [49] for burglary? Did he think he was doing it because he thought Officer Moritz was an alien, was out to get him?

So we'd also want to understand what his thinking was, the criminality of the behavior. Did he understand that what he was going to do, that shooting a policeman was a criminal behavior that was punishable by law? That it was a major felony? And I'd like to understand what – why he left the scene the way he did, rather than staying around and waiting for assistance.

Q. And we'll come to quite a few of those areas. If a defendant is unwilling or unable to provide you with any of this information, do you have secondary sources?

A. The secondary sources then become the physical evidence available, either through the police reports, the radio dispatch calls, eye witness accounts, and then secondary sources are psychosocial history, psychological testing and those things. But those things obviously become more and more distant to the moment that is the critical moment at hand, at issue.

Q. So if the defendant is not willing or able to provide information, what is the next step you look to?

A. The physical evidence available.

Q. Do you look at decisions made by the defendant before, during and after the crime?

A. Yes, I do.

[50] Q. Even if they're not provided to you by the defendant?

A. Correct.

Q. And, again, how is such evidence that you've described to us and I just mentioned, how is that helpful to you?

A. Well, it's the information that I rely upon in order to draw conclusions that I assume that the eye witness accounts, the police reports and so forth are factual, and so I assemble the facts and apply them as best I can to a psychological perspective; what are those facts? How do those facts inform me about the defendant's probable mental state at the time of the offense? So, for example, if he's seen fleeing the scene of the crime and is able to evade capture, then I'm going to make certain assumptions, such as that he was oriented to place, because he was able to

navigate the place, that he was able to think in a goal-directed, logical fashion because he was able to construct a strategy which was successful in evading a fairly intense manhunt. That if he attempted to elude the police when he's found by the police or resists arrest, I think that that's going to provide a basis for me to conclude that he's able to understand that he's in trouble and that the police are police and that they're there for a function, which is to [51] capture and incarcerate him.

Q. Do you find it of interest if, again, the defendant is unable to supply you with information or unwilling to meet with the people that had seen him last before the criminal act took place?

A. Yes, I do.

Q. And let me ask you if – in light of the fact the defendant here did not give you any information which was helpful, did he?

A. Not about the crime, no.

Q. And what he did was told you about Lake Powell Sarah story?

A. Correct.

Q. Which you understand is disputed by the physical evidence?

A. Correct.

Q. In light of his failure to give you any information, did you perform the evaluation in this case that you described to us just now?

A. Yes, I did.

Q. Tell us what – what evidence or what information provided to you was of significance in reaching your opinion which we're going to get to in a while?

A. Well, all the data that helped to construct [52] his psychiatric history was useful, whether that was the medical records from Aspen Hill or some of the reports from his teachers and students and the reports from his parents. The psychological testing was helpful, as well, and the interview of the parents was helpful. I would cite those as the major sources.

Q. Let me go through some specifics and see if you factored these in and if you feel it was appropriate to factor them in. And, again, we're discussing the second prong of the test. Correct?

A. Yes.

Q. Something we have referred to as the Thorpe Park incident. Are you aware of that?

A. Yes, I am.

Q. And what is your understanding of what happened at the Thorpe Park incident?

A. Approximately two weeks before the shooting of Officer Moritz, that the defendant came upon three people in Thorpe Park, including a Jason Tackett, who had gone to high school with him, and while there he more or less bragged about his plan to lure the police into a situation and he could shoot the police.

Q. Do you recall him specifically mentioning a .22 caliber weapon?

A. I believe he mentioned both a rifle and [53] pistol.

Q. Each .22 caliber?

A. Each .22 caliber.

Q. And he – you recall him saying he was going to fire his gun into the air in order to lure the police, and as they exited their vehicle, he was going to shoot them?

A. Yes.

MR. MIDDLEBROOK: Judge, I'm going to object to the completely leading questions. I'd rather find out what Dr. Moran actually relies on and as opposed to the leading questions we're hearing.

THE COURT: Counsel, I allowed you to ask leading questions with the expert so the state may do the same.

You may proceed, counsel. Overruled.

Q. BY MR. POWELL: Did this incident factor in your conclusion?

A. Yes, it did.

Q. In what manner?

A. Established a possible motive.

Q. Did you find any significance with the commonality of the caliber of the weapon in light of the fact the officer was killed with a .22 caliber?

A. I found significance with that and with the [54] fact that he had mentioned a similar theme to Desiree Barreras, I believe, one of his associates, he had bragged about wanting to shoot the cops.

Q. And are you of the opinion this was something that should have been considered by a mental health expert in determining insanity or sanity?

A. Yes.

Q. Let's move on to June 20th of 2000, the day before the murder.

A. Yes.

Q. We've had testimony, I believe you've read all the reports, that the defendant met with his mother at sometime during the day?

A. Yes.

Q. I believe somewhere around 2:00 or 2:30?

A. Yes.

Q. And that she, I believe, at first took him to the Sizzler restaurant. Do you recall that?

A. Yes, I do.

Q. Do you remember reading any reports, interviews of an individual who worked at the Sizzler by the name of Chris Walsh?

A. Yes, I do.

Q. And was there any significance in Mr. Walsh's statements about his observations of the defendant that [55] day?

A. Yes, there was. He reported that Eric seemed to be doing better, that on that day Eric seemed to be functioning better than he had been or was typically. I think he

specifically said that he didn't wander around the restaurant. It seemed like he was daydreaming as he had done in the past.

Q. Do you recall Mr. Walsh saying the defendant commented on a fight he had been in at a party earlier?

A. Yes, I do. I recall that he talked about when he had – he asked whether Mr. Walsh had seen him, I think, whip Brandon's ass, or something to that effect, beat up on Brandon.

Q. Anything of significance in this meeting with Mr. Walsh and the defendant?

A. Well, if the issue is the mental status of the offender at the time of the offense, any information we can have close to the offense is significant.

Q. Now, if we go to the parents, I believe – well, let me ask you this: When the mother dropped off the defendant at the Sizzler, she did not feel that she needed to go in with him?

A. She didn't go in with him.

Q. Any significance to that?

A. She didn't feel he needed supervision.

[56] Q. And then, I believe – tell me if this is right – the mother picked up the defendant after he called. They went to the home and then she later took him to a convenience store to buy some kind of soda pop. Is that what you recall?

A. That's what I recall.

Q. And, then, after that, they returned home and the father came home?

A. Yes.

Q. And when the father came, I believe he – they agreed they were going to go to the movie and the father dropped him off at the athletic club to shower?

A. First he asked if he could be taken to the athletic club to shower.

Q. And he was left there by the father?

A. Yes.

Q. Anything significant there?

A. Yes, there is. You know, I suppose one way of illustrating it is to talk about Mr. Clark's behavior when he was in the jail, when he allowed himself to be surrounded by filth. And so, generally, you know, people who are more psychotic are more neglectful of their grooming and hygiene. So the fact that he's asking to take a shower is indicating higher levels of functioning rather than lower levels of functioning. It's indicating [57] he was not entirely psychotically preoccupied.

Q. And then we've had testimony that he was then picked up by his parents at the athletic club and they went to the theater?

A. Correct.

Q. And you mentioned – did you know he watched the movie Shaft?

A. Yes.

Q. And we've had testimony that the defendant was then allowed to stay – at approximately 9:30 allowed to stay at the theater, the Harkin's Theater, and the parents left for home?

A. Correct.

Q. And do you recall how each of the parents described the defendant when they left him at the theater?

A. They generally described – well, they described him as that he was normal; he gave them a hug as they left.

Q. So each parent described him as normal, as you recall?

A. Yes.

Q. Any significance to the fact that they allowed him to stay there at 9:30 in the evening alone?

A. Well, again, they didn't act on to supervise [58] him at that time.

Q. I believe I asked one of the parents whether or not they saw any type of a weapon concealed on the defendant on the way to the movie theater or at the theater after they were leaving, and they said, no. And I don't believe that was contained in any reports. I just want to give that to you for the rest of your opinion here.

A. Okay.

Q. We've also had testimony from Gentry, the brother, that he returned home I think around 1:30, placed the keys on his desk in his room.

A. Yes.

Q. And those were later found in the truck. Correct?

A. Yes.

Q. Is there any significance that the defendant would have had to – or if you want to comment, if the defendant would have had to somehow travel from the theater to the home, enter the home, enter Gentry's room, obtain the keys, somehow obtain a weapon, go out to Gentry's truck, unlock the truck, get in the truck, place the keys in the ignition, start the truck and drive a stick shift; up to that part, anything significant with regard to his mental health?

[59] A. Well, they all reflect on his capacity for functioning and for recognizing reality, for carrying out a fairly complex sequence of behavior.

Q. Now, we know it was a – he was driving around a quiet neighborhood between – there's been some testimony even before 4:00 a.m. but let's say 4:00 to 4:50 a.m., with some type of rap music blasting. And he would have had to have had a loaded gun next to him. Would you like to comment on that? Any thoughts you have as to his mental status again?

A. Well, I guess for me that, you know, on the one hand, it again is indicative of his capacity for functioning, but the exact meaning of that behavior or the goal orientation of that behavior I think is unclear.

Q. If one's intent was to provoke a police officer to come to you, would you consider this provocative behavior?

A. Yes.

Q. And you're aware that at least one witness said he counted, I believe, 22 laps that the defendant was going through his neighborhood?

A. Yes.

Q. And, again, with the loud music the entire time?

A. Yes.

[60] MR. POWELL: Judge, its 10:25. Would this be a decent time for the break?

THE COURT: That's fine. Ladies and gentlemen, we'll take about a 10-minute break at this time. Thank you very much.

(Whereupon, a recess was had from 10:25 a.m. to 10:47 a.m.)

THE COURT: Let the record reflect the presence of the parties.

Counsel, you may continue your examination.

MR. POWELL: Thank you, Judge.

Q. BY MR. POWELL: Doctor, is there anything about the fact that the defendant was driving a stick shift vehicle that stands out in your mind with regards to his mental abilities?

A. I recall seeing in the records that there was some discussion of whether he knew how to drive a stick shift, and to the extent that he didn't know how to drive a stick shift, what one was doing with that would demonstrate his capacity for concentration, coordination.

Q. Now, when we left off, I think you agreed it can be defined as somewhat provocative behavior if he truly did want to attract a police officer to him?

A. Yes.

[61] Q. And we do know that he had a loaded gun next to him or on him. Let's take it to the next stage. We know that Officer Moritz is dispatched. You're aware of that. I think you had transcripts of the dispatch tapes and all.

A. Yes.

Q. At some point, he put on his overhead lights. At some point, he has to put on his siren. He does make the comment, I got someone running on me. And we know from earlier testimony, it's been 50 seconds from the time he says, I got someone running on me, to the time he says, I will be out with him. We know, again, from prior testimony that the defendant stops the truck with Officer Moritz behind him, in his vehicle, and that this is stopped just about a half block away from the defendant's parents's home, his own home. Any thoughts on that?

A. Well, he could have chosen to proceed home, would be one of the options that was available to him.

Q. And I don't think you – well, you may be aware of this. Dr. Morenz testified on Friday that the defendant had told him, even though he felt his parents may be aliens, his family was still – parents were still his best friends. Were you aware of that?

A. Yes, I am.

Q. And although we have no eye witnesses, we do [62] know Officer Moritz does exit his vehicle and he is shot and killed.

A. Correct.

Q. And from what we understand, the evidence then shows that the defendant took the weapon with him, the .22 caliber weapon, and fled. Is that your understanding?

A. That's correct.

Q. Any thoughts on that as far as his mental abilities?

A. Well, it appears to reflect organized behavior, goal-oriented behavior, and possibly evasive behavior.

Q. Is evasive something you look for when you're dealing with the second prong of the insanity test?

A. Yes, I do. If, for example, sometimes a person will commit a murder in a state of insanity or an insane state and believe that what they did was legally wrong but morally right and, therefore, they don't need to escape and so they wait for the police to come, expecting that the police will be of assistance to them and understand why they did what they did.

Q. Evidence has been that the defendant was able to conceal himself for about 16-and-a-half hours and, as [63] you had mentioned earlier, a rather intense manhunt or search for him. Any thoughts on that as far as his mental abilities?

A. Well, again, I think that that reflects that he's oriented to the situation and he was engaging in goal-directed behavior. There seems to be little other explanation

for why he would not become visible in any neighborhood during that period of time, and it suggests that he was aware that he had done something wrong and that he needed to stay away from the police.

Q. There's also been testimony that when the defendant was located, he was near his home, seen by a police officer, and he then ran from police officers who were giving him commands and were in uniform telling him to stop. Any thoughts on that?

A. Well, again, it suggests that he was aware that he was in trouble and that he was attempting to evade capture by the police.

Q. When he's arrested he does not have a weapon on him, he does not have the handgun. And I believe you have seen a photograph of the recovery site. And I could tell you that he had been seen fairly near that just moments before his final arrest. Thoughts on that as to his mental state?

A. To the extent that he's trying to hide the [64] murder weapon, again, indicates that he knows what he did was wrong and he's taking evasive action.

Q. And that he's – as he's running from the police officers near his home, he does not stop his flight until he's confronted by two detectives who are armed with weapons. And one testified that he aimed his laser at his chest; at that point in time, he stopped. Your thoughts on that as to his mental state?

A. That that reflects his capacity for good judgment.

Q. Now, you are aware of the details of his arrest from your review of the police reports?

A. Yes.

Q. Did you see any evidence there that the defendant was frightened of the police officers or that he ever said anything about the police officers being aliens?

A. No, I didn't see that.

Q. And are you aware that shortly thereafter when he was being processed for some physical evidence there was a female detective helping to straighten his pants and he offered for her to be allowed to touch his penis?

A. I saw that, yes.

Q. How does that factor in, if at all?

A. Well, I suppose one could interpret it as that [65] he was being flippant as opposed to being intimidated.

Q. Doctor, let's just get to your opinion. We haven't gotten to that yet. What is your opinion as to the defendant's ability to know whether shooting Officer Moritz was wrong? What is your opinion?

A. My opinion is that with the reasonable degree – to a reasonable degree of psychological certainty, that Mr. Clark knew that he was committing a criminal act when he shot Officer Moritz.

Q. And please explain to the Court why you've reached that opinion.

A. I reached that opinion because, with the variety of data that I relied upon, would include, I guess, beginning with the statements that he made regarding his intent to shoot police officers, both at Thorpe Park and to Desiree

Barreras and Lisa Oedekerk, made comments about anti-police attitude, that if he was intoxicated at the time of the shooting, that that would mean that he would not qualify as being insane and he may have been intoxicated, though we don't know.

The evidence that we have, the best data that we have to base a conclusion then is the information about his functioning around the time of the crime. And for me that included the fact that he had been dating a girl, I think as recently as the end of April. And [66] though he was somewhat bizarre on some of those dates, he was capable of having a dating type of relationship at that time, at least in her opinion. That he continued to workout regularly at the club and to be paying attention to his hygiene and his physical status that way. That he continued to socialize to some extent; he went to the party, at the party he engaged in that act of fisticuffs, he broke the kid's nose. We know that he was intoxicated at that time. We know that then the following Friday, that was on a Wednesday, and the following Friday he went to The Museum Club where he was observed socializing. He was by himself but still placing himself in the presence of his peers. That around this time, school was completing, and I think he completed the school year and earned some passing grades, as well as completing the correspondence courses that he had begun in the fall of 1999. Then we have the reports of the fellow at the Sizzler who says he seemed to be doing better than he typically had been when he was at the Sizzler restaurant, and he was engaging in that conversation of having been in a fight. So, again, his aggressive behavior is emerging as a theme, as a conscious theme, as a theme of selected behavior rather than reactive behavior against aliens. That the parents then report

that he was doing relatively well on that night. His mother spent from [67] roughly 2:30 in the afternoon with him until 9:30 at night, and she reported him to be normal, which I'm sure means normal for Eric as opposed to doing worse, given his typical range of functioning, but doing better in his typical range of functioning. That then we don't have any evidence of a stressor between 9:30 at night and 4:30 in the morning that would accommodate or explain the precipitous drop in his level of functioning that must have occurred if one adopts an insanity theory.

So that, ultimately, I suppose there's two primary theories at work; one would be an insanity theory that his mental status took a nose dive and he saw the policeman as an alien and attacking him. And I don't think that it's my job to engage in theorizing. I think it's my job to opine about the mental state at the time of the offense; however, I did note that there was no where in the data that Mr. Clark had mentioned the police as trying to get him or attack him. And I also noted that all of his concerns about being killed were about being poisoned. And so, suddenly, we would have to have that at the moment of the crime for the first time his delusional system incorporates the police as aliens engaging in active acts of aggression other than trying to poison him.

On the other side – and it's also [68] important to me that that theory is based on inference and speculation – that on the other side of the theory that would hold that he was volitional, that he was acting with a purpose, that the purpose was either to shoot the cop or possibly to evade apprehension because he thought he was being busted for burglary, that the – there's more data on that side, which is let's call it first degree data or primary data, physical evidence, whether that is the attempt to evade

the policeman, the hiding successfully for 16-and-a-half hours, the hiding the gun, the attempting to avoid the policemen at the time of his capture. And then, additionally, I do think it's significant that between the time that he left the theater and when he shot Officer Moritz, that he had to have the wherewithal in order to get into the house without being detected and steal his brother's truck, which apparently was an unusual behavior for him. So all of those things together led me to the conclusion that he probably knew what he was doing, that he knew that what he was doing was wrong.

Q. Now, sir, you are aware that insanity is an affirmative defense. Correct?

A. Yes.

Q. And the burden is on the defendant to come forward with evidence. Correct?

[69] A. Correct.

Q. Now, at this point in time, you're not saying that you know what was going on in the mind of the defendant at the time of the shooting?

A. That's correct.

Q. And I believe Dr. Morenz told us the same on Friday.

So are you saying that it's – you have to look at all of the other data? Since the defendant has not made any statements to any mental health experts as to what happened, we have to look at everything else and conclude from there?

A. Correct.

Q. And it's your opinion that using first degree data, as you put it, there is much more evidence that the acts were volitional than an act of insanity which would have to be based on inference and speculation?

A. Correct.

Q. In the world of mental health, particularly in forensic work – and if I've asked this, I apologize. I don't think I have – can it be presumed or inferred that because a person was suffering from a mental illness before and after a crime, that they – that that would account for their activities at the time of the crime?

A. No. I don't believe so. I think that you [70] have to have something that specifically ties a mental illness to the behavior.

Q. And it's your understanding that's what's required under the Arizona law?

A. Yes.

Q. You discussed intoxication a bit. Now, we do know that the defendant, when screened on the 22nd a number of hours after the murder, was negative for anything except the tabulates of THC?

A. Yes.

Q. And something that I don't think you've been made aware of, Dr. Keen testified after getting ready for some toxicological work said that any drugs that would have been in the defendant's system at the time of the murder would have been gone by the time the toxicology tests were performed.

A. Okay.

Q. Do you have any opinion at this point in time whether or not the defendant was intoxicated or under the influence of any type of drug?

A. Well, I have observations in that regards. I recall that in the truck there was found a marijuana pipe that had his DNA on it, I believe, and he – when I interviewed him, I talked at some length about his use of drugs and alcohol and about any patterns of abstinence [71] that he had, and he had indicated that there possibly had been a pattern of abstinence early in 2000, but not after that. That I was impressed through the records where I saw statements by people that he had been drunk to the point that if – once on senior ditch day if he hadn't been pulled out of the creek, that he might have drowned. That I think another defendant – he told another of his associates on one day that he had consumed two bottles of wine and that he was wreaking of alcohol and that he asked his associate if he wanted to smoke a joint. So with all that information in the background and with the widely accepted premise in clinical practice that people tend to under report the extent of their substance abuse, there's quite a – I think that would lead to drawing a conclusion that he was probably intoxicated at that time.

Q. And, if so, your understanding of the Arizona insanity law, that would not apply. Correct?

A. Correct.

MR. MIDDLEBROOK: Judge, I didn't hear that last answer, but I think it's been a repeated thing, but Dr. Moran is apparently some kind of legal expert as the facts relate to the law. And I don't believe, unless he has legal training, that he's – foundation has not been laid for those

type of questions that should be asked, whether Arizona law is applicable to a specific [72] situation.

THE COURT: I will sustain the objection. That is appropriate.

MR. MIDDLEBROOK: Thank you, Judge.

MR. POWELL: Judge, if I may, for the record, 13-502 does require the doctor to be very knowledgeable about insanity law to be allowed to do what he's doing.

THE COURT: I understand, counsel.

Q. BY MR. POWELL: In talking about delusions, you said that the defendant seems to have the delusion when someone was going to kill him, they were going to poison him. Correct?

A. Yes.

Q. Are delusions usually compartmentalized or generic and general?

A. They are generally compartmentalized. With paranoid schizophrenia, for example, one of the characteristics is that at person's cognitive function remains largely intact outside the delusional area. Delusions can be circumscribed to one particular focus. For example, I had a case in which a woman attacked her husband under a delusional belief that he was being unfaithful to her. That was the only delusion that she had. It was very tightly circumscribed but, generally, [73] delusions are circumscribed to some extent so that a person is paranoid but able to function in society.

Q. And that's the cognitive area we were talking about?

A. Yes.

Q. Would you, as a professional, if a person is – who is suffering from schizophrenia and feeling that – and paranoia also, feeling that someone is going to kill them by poisoning them, would you anticipate that they are going to shoot someone who has no ability to kill them with poison at that time?

A. It's not consistent.

Q. Doctor, before I finish here, do you want to place any limitations on your opinion for the Court?

A. Yes. Well, I think that it is my practice and I think its accepted practice that many – any time an opinion is rendered, you can cite the limitation. And limitations in this case, as in any case, that the accuracy and validity of my conclusions depends on the accuracy and the completeness of the data that I was provided. That, in this particular case, the absence of information from the defendant is a significant limitation and it's a significant hole in the data in terms of coming to an understanding of what his mental status was at the time of the offense. For example, if [74] he did adopt a more corroborative and forthright attitude about what was going through his mind at that time, my opinion might be different.

Q. Okay. And you prepared a document or mental state of offense, and I believe I was going to put that up, and I provided this to you earlier. Maybe this would help. Would you like to address this for the Court?

A. Yes. This is a chart I saw in the book that I was reviewing in preparation for trial. And the author here is identifying levels of data for mental state at the time of

the offense evaluations, and he identifies primary data as the defendant interviews or third party information about the crime scenario.

After that, the secondary information which is more general about the social history of the individuals and prior medical and psychiatric records. Beyond that you're into secondary information which is more specific, such as psychological testing or any kind of neurological testing to, you know, confirm an act for mental disorders. But I think it illustrates in the primary data category we're missing a very important element, and that puts a limitation on both my – I think it puts limitations on my conclusions.

Q. And any other mental health professional that's trying to do the same thing?

[75] A. Correct.

Q. Doctor, at this time, as you sit here, having considered everything, can you provide the Court with any link between the defendant's mental defect and with the crime itself?

A. No.

Q. If we were to use a but for test, but for the mental defect would this crime have occurred, would this crime not have occurred?

A. I think the problem is that we don't know that.

Q. And your opinion that the defendant – well, please again give us your opinion within a reasonable degree of psychological certainty.

A. That the defendant did know that his behavior was wrong, that the severity of his mental illness was not

such that it incapacitated him from appreciating the wrongfulness of his conduct.

MR. POWELL: If I could have a moment, your Honor.

THE COURT: Certainly.

MR. POWELL: Thank you, Doctor.

I have no further questions. Thank you, your Honor.

THE COURT: Thank you, counsel.

[76] Mr. Middlebrook.

MR. MIDDLEBROOK: I need a minute to get set up, Judge.

THE COURT: Certainly.

CROSS-EXAMINATION

BY MR. MIDDLEBROOK:

Q. Dr. Moran, if I refer to your interview – there's a copy, Judge – I filed a copy with the clerk.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: Dr. Moran, I had an opportunity to interview you approximately a month ago. Correct?

A. That's correct.

Q. And then this morning we were given a complete list of probably an additional 15 to 20 documents that you reviewed after that interview?

A. Correct.

Q. Prior to your – prior to the interview, it would be fair to state that you had not reviewed any of Dr. Parrish's works; is that correct?

A. If it's not listed in the documents I reviewed, that would be correct.

Q. Last night I received a copy of your notes.

A. Yes.

Q. Correct?

[77] A. Yes.

Q. And I asked for that about a month ago. Correct?

A. You asked for it on July 23rd.

Q. Okay. I just want to have you – do you have a copy of that in front of you, your notes?

A. I don't believe so.

Q. No?

A. No.

Q. Well, let me just have you identify one document for me. I'm going to hand you what's been marked Exhibit Number 100. Ask you if, first of all, that was part of the notes you provided to me and, secondly, whether you would have authored that?

A. Um, well, these are parts of working notes. And I didn't author this document. This document was authored by David Weinstock. And that would have been –

Q. Is that a document that would have been sent to Mr. Rozema or Mr. Lessler earlier in the case?

A. I don't believe so.

Q. If you look through that document, please, I don't see any documents that are referenced within it that are subsequent to September, 2000. Would that give any bearing as to when that particular document was authored?

[78] A. Yeah. I believe it was towards the beginning of my involvement in the case.

Q. Okay. And would that document have been provided to the state, either to Mr. Lessler, to Mr. Rozema or to Mr. Powell?

A. Not that I'm aware of, except for as it was provided to Mr. Powell as it was to you.

Q. I'm sorry?

A. It was provided to Mr. Powell last night as it was to you.

Q. Correct. You've told the Court that you're a forensic psychologist. Does a forensic psychologist strategize with the lawyers?

A. Yes.

Q. Yes?

A. Yes.

Q. That's part of the evaluation process – independent, objective evaluation process is to strategize with the attorneys?

A. No. It's part of the preparation of court. It's part of the process that has to do with preparation for court.

Q. And also in preparing your reports?

A. No. I didn't strategize with him about that.

Q. Well, Dr. Moran, you told us that you authored [79] this particular document.

A. No, I didn't.

Q. Sometime – I'm sorry. Let me ask it a different way. You relied on this particular document early on in the case. Correct?

A. Correct.

Q. All right. And you're telling us that as an independent – as we look at your opinion contained in your report as to its independency, that you believe it's okay to strategize with the lawyers that have hired you?

A. I believe it's appropriate in legal cases to consult with the attorneys regarding the forensic aspects; that is, the intersection of psychology and the law. I don't believe it's appropriate for me to let a lawyer tell me how to do my job or think or how to write a report.

Q. All right. Now, in regards to your independence, you've never been hired by the defense to render an opinion. Isn't that true?

A. Regarding an insanity case?

Q. Correct.

A. That's correct.

Q. So your view of the Arizona law regarding insanity, your view of the – how certain behaviors may relate to that analysis, you've never been asked by the [80] other side to do that, have you?

A. No, I haven't.

Q. And you've been doing this type of work 12 to 15 years. Correct?

A. Correct.

Q. I'd like to turn your attention to that particular document that I have handed to you.

A. Yes.

Q. On page two of that document, does it set forth a strategy of, in this case, as to what the defense may do and what the prosecution may do?

A. Yes, it does.

Q. And so when you come into court and tell us about, for example, that Eric ran from the scene has significance, that voluntary intoxication he may have been under the influence has significance, that's all contained within this strategy, isn't it?

A. I accept your word that it is.

Q. You can, because I read it very carefully.

A. Okay.

Q. Also, you indicate in this strategy that –

THE COURT: Excuse me, counsel. You're misstating the evidence when you say, you indicate. It was authored by Weinstock.

MR. MIDDLEBROOK: But he's relied on it.

[81] THE COURT: They are two different things.

Q. BY MR. MIDDLEBROOK: Mr. Weinstine (sic) works with you?

A. Weinstock, yes. Yes.

Q. Okay. And the work that he does for you, you rely on, in particular in this case. Correct?

A. Yes.

Q. Okay. And so when Mr. Weinstock's outlining a strategy, that was something you asked him to do. Correct?

A. No. I didn't ask him to outline a strategy.

I asked him to review some documents, to provide me some summary of the documents. And I might point out, Mr. Weinstock is a Ph.D and J.D. so spontaneously and his own he presented it to me in this fashion.

Q. But you read it?

A. I read it.

Q. And considered it prior to writing your report. Correct?

A. That's correct.

Q. Okay. And as part of the strategy in – in preparing your report, you also relied on Dr. Jack Potts, who's the state's consultant in this case. Correct?

A. Correct.

Q. And you talked to him about what would be [82] contained in your report, didn't you?

A. Yes.

Q. Prior to writing your report. Correct?

A. Prior to releasing it.

Q. Doctor, wouldn't you agree with me that insanity is merely a gross impairment of reality?

A. I think insanity is a legal term.

Q. But you have rendered an opinion, have you not, as to whether Eric was insane at the time of the shooting?

A. I would more specifically disagree that insanity is merely a gross impairment of reality.

Q. And you would agree with me that anyone who says merely that it's a gross impairment to reality, that we should not consider their opinion wholeheartedly?

A. It depends on the context.

Q. If someone was being asked the definition of insanity and what it means, under that context, should we consider the opinion or not?

A. Could you repeat the question or rephrase it?

Q. My question to you was simply, do you agree that the definition of insanity is merely the gross impairment of reality?

A. I disagree with that.

Q. And you would disagree with the person that [83] would use that as a definition?

A. Yeah, I guess so.

Q. Especially where that person is being asked what their definition of insanity is?

A. Again, I think it would depend on the context, but broadly speaking, I would disagree with that.

Q. Well, Dr. Moran, I'm telling you the context in which this question was asked. I'm asking you, yes or no, do you agree with that opinion or not, if someone is being asked, what is your definition of insanity, and they told us, it's simply the gross impairment to reality, should we consider that person's opinion as accurate?

A. Well, I mean, the context, I don't know whether that's a conversation that occurred.

Q. Is that yes or no?

A. I can't answer it yes or no.

Q. All right. Well, let's turn to page 76 of your interview.

A. Okay.

THE COURT: Counsel, this has not been marked into evidence. Is it going to be?

MR. MIDDLEBROOK: I had asked your clerk to.

THE COURT: It's not been marked.

[84] MR. MIDDLEBROOK: It's just simply demonstrative.

THE COURT: Mr. Powell, do you object to me considering this as he questions him?

MR. POWELL: What is it?

MR. MIDDLEBROOK: It's a copy of the interview.

MR. POWELL: Is it going to be admitted?

MR. MIDDLEBROOK: It's not going to be admitted, no.

THE COURT: I don't know. That's the problem.

MR. POWELL: Well, I think it's hearsay, Judge. I don't think with – I don't see how it can be considered at this point in time.

MR. MIDDLEBROOK: It relates to prior inconsistent testimony, Judge, exception to the hearsay rule. It's clearly admissible to impeach a witness with a prior statement.

THE COURT: I'm going to allow it.

Go ahead, counsel. I will not admit it.

MR. MIDDLEBROOK: Judge, I would ask if you would like to turn to page 76.

THE COURT: Counsel, I think you have to establish what it is that he said wrong before I can read [85] it under the rules.

MR. MIDDLEBROOK: Judge, I think – I think that we're allowed to.

Q. BY MR. MIDDLEBROOK: First of all, let me just ask. Why don't you take a look at that interview and let me ask you a basic question. Does that appear to be a fair and accurate transcription of the testimony you

provided – or excuse me – as to the interview, the questions and answers that you provided to me?

A. What line is it?

Q. Just look through the entire interview at this time.

A. On page 76?

Q. No. You can just look through the entire interview. At this point, I'm not referencing any particular page. Dr. Moran, can you just simply look at the interview and transcript and tell me if that appears to be a fair and accurate copy of the question and answer session that we had?

A. It does.

Q. Okay. Now, please turn to the bottom of page 75. And I'm simply going to ask you whether this question was asked and whether this was your answer: When you say that last statement, when you say in order to determine the legal standard of insanity, are you [86] basing that on any authoritative text besides the statutes you cited?

On page 76, top line, well, gross impairment of reality testing is a common standard that's used in the community, and I think that there are symptoms that are associated with that.

Do you see that?

A. Yes.

Q. Was that your answer to the question that I asked?

A. Yes, it was.

Q. And you would agree with me, would you not, that you intended to mean that gross impairment to reality is a standard for insanity within your community?

A. I think that that's what I said, gross impairment of reality testing is a common standard that's used in the community.

Q. All right. So, in other words, if Judge Coker determines that Eric was grossly impaired as to his ability to perceive reality, he would be insane. Correct?

A. No. I'm saying on page 75 I said – your question was: Are you basing that on any authoritative text besides the statutes that you cited? And so I think that my answer can be understood that I was citing the [87] statute. And then, additionally, I was saying that within the community, that people talk about gross impairment of reality testing.

Q. I'm sorry, Dr. Moran. That wasn't the question I asked.

A. Okay.

Q. I know that you want to answer a different question, but that wasn't it. The question that I asked was simply, if Judge Coker determines that Eric's impairment to reality was grossly impaired, that under what you've told me is your answer as to a legal definition of insanity, Eric would be insane. Correct?

MR. POWELL: Objection, your Honor. Same objection counsel made when I asked a leading question of the witness.

THE COURT: I don't like the leading nature of it. I think the Doctor is trying to explain the answer and you're trying to ask him a question he can't answer because it's different, sounds like it's a very narrow –

MR. MIDDLEBROOK: Let me ask it this way – I will ask it this way.

Q. BY MR. MIDDLEBROOK: Within your community, psychological community, you would agree with me, most professionals rely on a standard of gross impairment to [88] reality in determining whether someone is insane or not. Is that a fair statement?

A. I think that has to be one component.

Q. Well, you certainly didn't add any other components to your answer, did you, when I asked that question?

A. Not at that moment.

Q. Okay. And, Doctor, let me ask you this: You understood that when I was there asking you those questions, and I had only received your report the day before that interview, that I was there to learn the nuances contained within your report?

A. I understood that.

Q. And you understood that that was going to be my interview of you so that I could prepare for your testimony today. You understood that, too, didn't you?

A. I did.

Q. And I also asked you that if there was any – at any time during my interview session with you that you

felt you needed to go back and clarify an answer, that I would always give you that opportunity, didn't I?

A. Yes.

Q. As we sit and speak today, Doctor, are there any answers that you feel are necessary to change?

A. I guess I would change that one.

[89] Q. Okay. Any others as we sit and speak?

A. I'd have to review the document to answer that. I did review the document and I found a number of things that I didn't think was expressed as well as I might.

Q. All right. When I was asking you those questions, your mind was clear, you weren't under stress, drugs, anything like that; is that correct?

A. That's correct.

Q. Let's talk about some things we might be able to agree on. First of all, you agree that Eric has paranoid schizophrenia?

A. He suffers from that, yes.

Q. And that as a sufferer of paranoid schizophrenia, that his – that he would be cognitively and socially impaired?

A. To some extent.

Q. And that one of the factors in looking at cognitive impairment would be standardized testing?

A. Yes.

Q. And that we know that from Eric's standardized testing from the 9th to the 10th grade, he significantly dropped in such things as reading comprehension and reading ability to about the 5th or 4th grade level. Correct?

[90] A. That's correct. We don't know whether he was intoxicated when he took that test.

Q. Is there any other thing you'd like to tell us about intoxication so that we can not have to keep having to insert that in every question or every answer that I ask you?

A. Not at this time.

Q. Because you've ruled out intoxication as a significant contributor to his psychosis, haven't you?

A. I recall that question.

Q. I'm sorry?

A. As a significant, yes. I don't think it was a significant contributing to his psychosis.

Q. All right. Do you have any evidence, Doctor, that Eric was intoxicated when he took those tests?

A. He said he got stoned every day from the 9th grade on.

Q. Okay. And so in the 9th grade he took those tests stoned and he did just fine; 10th grade he significantly drops.

A. Okay.

Q. So my question to you, Doctor, I mean, do you have any evidence he was intoxicated, yes or no?

A. No.

Q. All right. You told me during the interview [91] that Eric suffers chronically or continuous symptoms of paranoid schizophrenia. Correct?

A. Correct.

Q. As a chronic sufferer, he would be unable to perform complex tasks?

A. Correct.

Q. As a sufferer of schizophrenia paranoid type, he would suffer persecutory delusions?

A. Correct.

Q. Well-documented in this case?

A. Yes.

Q. He would suffer grandiose delusions?

A. Probably.

Q. For example, the rap stars are going to elect him president, would be a example of a grandiose delusion?

A. Yes.

Q. Paranoid schizophrenia is characterized by distorted thinking?

A. Correct.

Q. Sufferers of paranoid schizophrenia have a difficulty in distinguishing between external reality and internal reality?

A. At times.

Q. As a sufferer of schizophrenia, hallucinations [92] don't necessarily have to be command hallucinations to suffer them. Correct?

A. Correct.

Q. As a chronic sufferer of schizophrenia, we would expect to see someone's social habits deteriorating, for example, like leaving the bathroom door open while they defecate or urinate?

A. Correct.

Q. We'd expect that person to also have a lack of emotional response, flat affect is often the terminology; is that correct?

A. That's correct.

Q. And be – with paranoid type schizophrenia we would expect that person normally in their delusional state to be hostile, suspicious, and guarded?

A. Could you clarify by what you mean in their delusional state?

Q. Well, they're suffering paranoid type, they're typically delusional?

A. I think that they – I don't think that's specific enough. I think that there could be times that they are engrossed in their delusional state and other times when

the delusional state is more central from their mental status.

Q. Okay. Typically, does a paranoid [93] schizophrenic usually exhibit behaviors that are hostile and suspicious or guarded?

A. Not all the time.

Q. I'm not saying all the time. I'm saying is it typical behavior?

A. I'd say it's frequent. Common. Typical is fine.

Q. Well, actually, let's go back to that. DSM-IV criteria, what does it tell us about guarded, suspicious or hostile behavior?

A. That's one of the criteria.

Q. Specifically listed and gives in DSM-IV criteria for paranoid schizophrenia. Correct?

A. That's correct.

Q. Okay. And examples of that would be delusions about the end of the world?

A. Yes.

Q. And delusions about they're out to get me?

A. Might be, yes.

Q. Well, they're out to get me, can you tell me what type of delusion that would be other than paranoid?

A. Well, for example, in the MMPI there is a question that says, people are plotting against me, and that is commonly responded to in the affirmative by people who

are in custody disputes. So the idea that [94] people are out to get you is such a common phrase in our culture that I don't think it's specific enough to relate in and of itself in psychosis.

Q. Do you think Eric is involved in a custody dispute here, Doctor?

A. No, I don't.

Q. Okay. So if Eric was using the phraseology, they're out to get me, can you imagine what other context it would be than paranoid?

A. For Eric it would seem to be more paranoid.

Q. Okay. You're not trying to change your opinion here that Eric's not paranoid schizophrenic, are you?

A. No.

Q. Okay. You'd agree with me that typically paranoid schizophrenics are more sensitive to situations?

A. Depends on the situation.

Q. Critical or rejection type situations?

A. I'd agree with that.

Q. And, also, those can be perceived by the paranoid schizophrenic, even being very trivial rejections or criticism, can be inappropriately responded to. Correct?

A. I agree.

Q. You'd agree with me, would you not, that often [95] a paranoid schizophrenic's reactions to a particular situation are unpredictable and variable?

A. Can be.

Q. You'd agree with me that delusions often occur extraordinarily or rapidly?

A. It could occur rapidly?

Q. Correct.

A. That can happen.

Q. For example, they can have a moment they can see something on TV and believe God was speaking to them at that moment in time?

A. Yes.

Q. As paranoid schizophrenics – excuse me – if someone's suffering simply schizophrenia, it's often difficult to change those person's logics with reason?

A. Correct.

Q. For example, my mother's an alien, would be an example of repeated attempts by the mother to convince the son that he was not an alien or she was not an alien would be an example of that. Correct?

A. Correct.

Q. Or the school counselor comes in and says repeatedly to the students, you cannot have that class because you don't qualify, and yet the student continues on and on and on about trying to get a particular class, [96] that would be an example of that, as well, wouldn't it?

A. That wasn't clear to me that that was a product of his illness.

Q. I'm sorry?

A. If you're speaking about the incident that occurred at school, when I read that report, that wasn't clear to me that that was a product of his illness as opposed to his personality disorder.

Q. Well, Lois Wells told us – she testified – have you reviewed her trial testimony, by any chance?

A. No, I haven't.

Q. She testified that it was unbelievable that he would not change his mind.

A. Okay.

Q. And we're going to talk about your diagnosis of personality disorder shortly. We often see chronic schizophrenics neglect their personal appearance?

A. Correct.

Q. We often see their verbal communications as empty or obscured?

A. Correct.

Q. When questioned why patients, schizophrenics, believe in their delusions it's often, I don't know, I just know, basically contradictory logic but still their logic?

[97] A. Correct.

Q. And drug abuse is common among schizophrenics?

A. Correct.

Q. And often one of the problems becomes, how do you distinguish between drug-induced psychosis and the mental disease itself?

A. That's correct.

Q. It's kind of like pouring milk into coffee, after its there, it's a little hard to separate it. Correct?

A. Correct.

Q. With paranoid schizophrenics in particular, suicide's common?

A. Yes.

Q. As high as 40 percent?

A. I accept that.

Q. Okay.

A. Suicide attempts.

Q. All right. Often schizophrenics kill in response to the relentless pressure of, I can't take it anymore, they won't leave me alone, those are common themes among schizophrenics as to why they kill. Is that a fair statement?

A. I'm not familiar with that.

Q. All right. Let me ask you. I thought I saw [98] in your office A Comprehensive Textbook On Psychiatrists written by Kaplan in the year 2000. Is that a book that was in your office?

A. That was on the bookshelf, yes.

Q. Okay. I will show you some photocopied pages, but let me see if I can find it here very quickly. And just to be fair here, you rely on that textbook as a reliable source?

A. That is a reliable textbook, yes.

Q. Let me have you look at page 11. First of all, let me ask, just looking at that, whether that appears to be the Comprehensive Textbook Of Psychiatry written by Kaplan?

A. Appears to be.

Q. Okay. And when we're talking about violence of schizophrenics, does it appear under there that basically suicides, attempts to kill, that type of thing, are surprising because – and unpredictable?

A. Yes.

Q. Okay. And in regard to the predictability of violence, there is typically no clear signs that violence will occur?

A. Oftentimes there's not.

Q. For example, it's replete with literature of examples given with suddenly someone just walks in and [99] suddenly hangs themselves, walks in, apparently with no distress, kills their mother or sister because the sister a year before or the week before had said something to the effect of, I'm not going to ask you for your release at the hospital because you didn't do the dishes.

A. Those kind of anecdote reports are in the literature.

Q. And you would agree with me, would you not, that oftentimes one of the symptoms of paranoid schizophrenics, including this case, is child-like silliness, unpredictable and untriggered agitation?

A. I would agree with that in part. It's triggered, it's just that it's triggered at a much lower threshold.

Q. In other words, it doesn't take much to get someone going?

A. Correct.

Q. And you would agree with me that appearance – that a person's appearance eight hours prior to a violent act is a unreliable indicator of potential violence?

A. I think unreliable is too strong a word.

Q. Even in light of the literature that talks about how surprising, how quick, how things like that violence can occur with no apparent –

A. It might correlate with their behavior in [100] eight hours and it might not.

Q. So do you believe, yes or no, that appearance is a significant factor in predicting violence?

A. I believe it is.

Q. You do?

A. Yes.

Q. Okay.

A. I think depending on how you define appearance.

Q. Have you heard that phrase, you can tell a lot by the way a man thinks by the look in his eye?

A. I think I have heard that phrase.

Q. Do you agree with it as it's applicable to mental illness?

A. No.

Q. Okay. I'd like to clarify something, Doctor. You've ruled out malingering in this case. Correct?

A. Correct.

Q. And, in fact, you used the diagnostic criteria for DSM-IV as it's set forth, the criteria for determining whether someone is malingering, you used that criteria and ruled it out in this particular case. Correct?

A. Correct.

Q. And when you first interviewed Eric, you [101] believe that he was straight with you about the delusions that he explained to you. Is that a fair statement?

A. That's correct.

Q. And you have also ruled out drug-induced psychosis as a reasonable explanation for his long-term behavior?

A. Correct.

Q. Doctor, you're aware that in the numerous voluminous records, police reports that you reviewed in this particular case, the police's chronic thing was, we believe Eric was intoxicated, correct, at the time of the shooting?

MR. POWELL: Objection, relevance, Judge.

THE COURT: Overruled.

You may answer the question if you can.

THE WITNESS: What I recall is reading an objection that the interviews were – of the associates and so forth were emphasizing his drug behavior in excess.

Q. BY MR. MIDDLEBROOK: And very little discussion about his paranoia, his other bizarre behaviors with most witnesses. Correct?

A. That's correct.

Q. So when you rely on those reports, you have to rely on them with some skepticism, don't you, as a mental [102] health professional?

A. You have to be aware of it, yes.

Q. I'd like to talk to you a little bit about Eric's interview. And if at any point you need to refer to your notes about that particular interview, if you'll simply inform us that that's what you're going to do. Okay?

A. Okay.

THE COURT: Mr. Middlebrook, sounds like this is going to take a few minutes, and I have a meeting at noon I have to attend, so we'll take our noon recess at this time. I'd like to have everybody back at 1:30 this afternoon and we will reconvene at that time. Thank you.

MR. MIDDLEBROOK: Thank you. Could we have a quick meeting with you about a scheduling issue?

THE COURT: Yeah.

(Whereupon, lunch recess was had from 11:47 a.m. to 1:37 p.m.)

THE COURT: Let the record reflect the presence of the parties.

Counsel, you may continue your cross-examination.

MR. MIDDLEBROOK: Thank you, Judge. I need just a second.

[103] Q. BY MR. MIDDLEBROOK: We're going to talk about Eric's interview that you had with him. If at any point you need to either reference your report or specifically your notes related to that interview, would you just simply tell us that, Doctor?

A. Okay.

Q. First of all, during that interview session, was Eric cooperative with you?

A. Yes.

Q. And you were aware that as you were interviewing him that he was under the affects of Haldol, an anti-psychotic medication?

A. Yes.

MR. POWELL: Excuse me, Bryon, which interview is this?

MR. MIDDLEBROOK: It's the one dated June 30, 2003.

MR. POWELL: All right.

Q. BY MR. MIDDLEBROOK: Actually, you interviewed Eric twice. Correct?

A. Correct.

Q. Let me ask you whether or not he made the following statements during his interviews, okay, when you were interviewing him did Eric relate to you that this

pen this thing, the shaking, flicking of the pen was [104] a laser that only aliens could see?

A. Yes.

Q. And he thought that one of the reasons that he was put in jail was because the aliens hated him?

A. Yes.

Q. He also related he thought that Flagstaff was full of aliens?

A. Yes.

Q. And including his mother, his father, his brother and sister?

A. Yes.

Q. He asked if you were an alien?

A. Yes.

Q. It's apparent Eric still holds the belief that he – that aliens inhabit the planet?

A. It is.

Q. And I think he told you that – or when you asked him, why do you think the aliens are here, he told you that it was to expand their territory and trade for broccoli and sugar?

A. Correct.

Q. Okay. And I think when you were in this questioning phase, you went back to Eric and I think you kind of reference back to the time prior to the shooting of, you know, why were the aliens here, and he basically [105]

said, I don't know, but he continued to say that there was a constant – he had a constant belief that the aliens were trying to kill him?

A. I don't remember him saying that specifically.

Q. Would you look at page 34 of your report?

THE COURT: Counsel, do I have that report in here?

MR. MIDDLEBROOK: It's in the defense exhibits, Judge.

THE COURT: Exhibit which, counsel?

MR. MIDDLEBROOK: Page 34 –

THE COURT: No, exhibits, which one?

MR. MIDDLEBROOK: Oh, um, 5B, I believe.

THE COURT: And which page again?

MR. MIDDLEBROOK: We're on page 34 of his report.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: Towards the bottom of that page, Doctor, you noted that in your commentary with Eric the question was, line 26: What do you best recall about what you were thinking then about why aliens were here?

I don't know. Probably something except they wanted to kill me.

Why think that?

[106] I don't know. I don't think that anymore, but I think that's part of the reason why I'm – if – why were you thinking they wanted to kill you?

Yes. I thought they wanted me dead, to poison me through my clothes and my food. At the Coconino County Jail they poisoned me badly, et cetera. Correct?

A. Correct.

THE COURT: Counsel. I'm sorry. I take you for what you're saying, but it's not in here. B, 5B –

MR. MIDDLEBROOK: I'm sorry.

THE COURT: That is not conforming.

MR. MIDDLEBROOK: It would be – may I? I don't have my exhibit book with me, Judge.

THE COURT: Here.

MR. MIDDLEBROOK: I may have written the wrong number. There's an index at the front. Yeah, 5B.

THE COURT: Not my numbering.

MR. MIDDLEBROOK: No, the numbering on your copy is different. Here. Yeah. Dr. Moran and I had another problem when I was interviewing him. Maybe I can find it for you. Apparently, unfortunately, your numbering is different than ours.

Judge, it just occurred to me, I think I [107] have got another copy that references the same numbers. Let me grab it.

THE COURT: Okay. Thank you. I assume, counsel, you have no objection to this. It's your doctor's report.

MR. POWELL: No. That's fine, Judge. No objection.

THE COURT: Thank you.

MR. MIDDLEBROOK: Well, this is odd, Judge, because the copy I've got is the same one as yours, apparently, and yet it's different in my book.

THE COURT: Counsel, if you just want to tell me and I will take a note here.

MR. MIDDLEBROOK: I was going to see if I can find it on the page, Judge. It's apparently a few pages later. Your page is 36, your page is 36 and 37.

THE COURT: Okay. Thank you, counsel.

MR. MIDDLEBROOK: And, Judge, I'll try to make sure I get a copy of the two of the same pages as we reference through these.

THE COURT: Why don't you do that, ask the Doctor again so I know where you're talking about.

MR. MIDDLEBROOK: Yeah.

Q. BY MR. MIDDLEBROOK: As you talked to Eric, was it apparent to him that the aliens were constantly [108] trying to poison him prior to the shooting?

A. Yes.

Q. And when you were talking with him about the extent of the poisoning and I just read where I thought

they wanted me dead, they were trying to – he related to you that they were trying to poison him through his clothes, his food at the jail, in his car, which is why he had the bird?

A. Right.

Q. And when he told you about why he had the bird in the car, he – he more or less explained the story that it was kind of like a coal miner's bird, to test whether the air was poisoned?

A. Correct.

Q. And he also told you that, at some point, he believed that that bird, the aliens had actually taken that bird, replaced it with a robotic one and put it back so that way Eric couldn't tell whether the air in his car was poisoned or not?

A. Correct.

Q. And when he was talking to you about his belief that his parents at the time were aliens – on and off were aliens, he also commented, sometimes I think my mother is doing bad things for me. She tells people I'm schizophrenic.

[109] A. Right.

Q. And he also related to you that he thought his parents were keeping their identities as aliens secret from him?

A. Correct.

Q. He related to you that when he decided in his junior year, beginning of junior year not to play football,

that he believed it was at that time the aliens had poisoned him?

A. Correct.

Q. And that was around fall of 1999. Is – does that correlate with your time frame?

A. Yes. That's when he felt that he was first concerned about aliens.

Q. Okay. And, yet, we know that the first time he related to his mother the alien theme was April, 2000. Correct?

A. Correct.

Q. So he kept that to himself for a number of months?

A. Yes.

Q. When he was talking about getting in his car, he said words to the effect of, it was like poison in there?

A. Is that in my report?

[110] Q. Yes. It would be page – and I apologize to you, Judge – but it would be about page – towards the end of page 35, which would be their 36 or 37, Judge, line 24 and 25, I will read as follows: Are there memories of specific times you thought someone was out to get you?

I feel my clothes and they didn't feel clean. I felt they were poisoned. I opened the door to the car and it seemed like poison in there. I'd be breathing the air and it did not seem clean, so I thought aliens were trying to kill me a lot.

A. This is in my report or in the interview notes?

Q. Should be page 35, lines – as I see it in mine – let me double-check what I'm looking at – yeah, this would be your report, lines – page 35, lines 25 – what I just read was lines basically 23 through 26.

A. Our pagination doesn't agree.

Q. Maybe you have the same –

THE COURT: Why don't you start – work off the one we're all working off, counsel.

MR. MIDDLEBROOK: Yep.

Q. BY MR. MIDDLEBROOK: Let me look at the pagination of that. Let me look at the pagination of yours. Now, is this –

[111] A. That's my copy.

Q. This is your copy?

THE COURT: Mr. Powell, do you have a copy that we're looking at or do you have the one he's looking from?

MR. POWELL: Judge, I'm going to check. I may have – I think I have both.

THE COURT: See what we can do to be all on the same page.

MR. MIDDLEBROOK: Yeah. I apologize, Judge. Something's happened on the prints.

THE COURT: I don't have any line numbers on my pages, none at all.

MR. MIDDLEBROOK: Yeah, then that means – unfortunately, that means you got the e-mail copy. That would be page 37.

Look at page 37, Doctor.

THE COURT: All right. Thank you. And maybe you can just refer to two-thirds of the way down.

MR. MIDDLEBROOK: Yeah. Okay.

Q. BY MR. MIDDLEBROOK: Would – let me see how the end of page 37 is.

A. It's not – it's a different page. That's 36 now.

MR. MIDDLEBROOK: The pagination is even [112] worse than this one. I apologize. You know, Judge, what I would suggest is that we take a small break and – and get copies so everybody's on the same page. His copy is different than my copy and it's different than the copy that you have as far as pagination.

THE COURT: Are you going to be using it very much more?

MR. MIDDLEBROOK: I believe I will be.

THE COURT: All right. Which one are we going to agree on?

MR. MIDDLEBROOK: Which one – what copy do you have, Dave?

THE COURT: If you have a copy that has the lines designated numbered –

MR. MIDDLEBROOK: That's the copy that I have. Yeah, Judge, could we just take a minute and copy it because Mr. Powell and I have the same pagination.

THE COURT: Is there something else you can be talking about and she can – Lucy can start making copies while we work.

MR. MIDDLEBROOK: Um, sure. Actually, let me look through my notes real quick, Judge.

You know, actually, I think if I could just get through the interview portion, it looks like it's quite a while before I have to get back to the [113] report.

THE COURT: Okay.

MR. MIDDLEBROOK: So if we can kind of scuffle through this a little bit.

Q. BY MR. MIDDLEBROOK: I was reading lines (sic) 35. I think that would be your page – let me look, Doctor.

A. I'm sorry. I just don't see it in my report. I don't see it in my notes. I don't see it.

MR. MIDDLEBROOK: He doesn't have that in his group. Why don't I come back to this area, Judge. I will see if I can't move – and we're going to have to come back because his pagination, I think we've got five different copies, it looks like.

THE COURT: Is this something we can have Lucy working on while we're doing what we're doing so we can get some conformed copy?

MR. MIDDLEBROOK: Yeah. Why don't I give Josh my copy of my report and have them make copies for everybody, and at least that way we're more or less on the same page.

THE COURT: Three copies enough?

MR. MIDDLEBROOK: We'll need one, two, three, and I will need mine.

THE WITNESS: Do you think I – do you [114] think you need one more for me, a copy for me?

MR. MIDDLEBROOK: Only because we'll have all the same pagination.

THE WITNESS: Right.

MR. MIDDLEBROOK: I apologize. I didn't realize that was an error.

Q. BY MR. MIDDLEBROOK: All right. Let me talk a little bit about – kind of shift gears here a little bit. As you were talking to Eric – we'll come back and talk about the details of your conversations later.

A. Okay.

Q. But when someone is paranoid schizophrenic, they may or may not be a reliable historian as to events that occurred. Is that a fair statement?

A. Yes.

Q. And that could be, for example, people who refuse to cooperate with their attorney?

A. Correct.

Q. Or that their memory of the events may be unusual because of a psychosis or a delusion?

A. Correct.

Q. Now, one of the – in developing a history of a patient, a mental health provider basically is concerned about not only what a patient tells them happened, but also reliable sources independent of the [115] patient so that there can be more or less a comparison to determine, for example, whether the patient is a reliable historian or not?

A. Correct.

Q. And one of the things that you did in this case, and I think I told you during my interview I was very appreciative and I thought you did a very good job in developing a history by interviewing the Clarks. Correct?

A. Correct.

Q. And when you talked to Dave – excuse me – Terry and Dave Clark, do you recall at any time asking them anything about Eric's behaviors after Eric's arrest?

A. No.

Q. So I know that Mr. Powell was asking you whether or not you heard about Aaron's story. I want to tell you now that that was related about August 20th or 22nd, I'm not sure of the exact date. So you would not have asked Terry Clark or Dave Clark specifically about things Eric may have been saying after his arrest?

A. Correct.

Q. Now, when you consulted with Dr. Potts prior to writing your report, one of the things that you discussed was your potential diagnosis that Eric was paranoid schizophrenic?

[116] A. Correct.

Q. And he agreed basically with that diagnosis?

A. I believe he did.

Q. And one of the things that was also discussed was whether Eric was intoxicated on LSD or whether his psychosis was a result of LSD. Correct?

A. Correct.

Q. And that was ruled out, as well, in your – not only your discussions but by you, as well?

A. Correct.

Q. And if you were discussing the issue of insanity with Dr. Potts, you told him at that time that really you could look at this different ways?

A. Correct.

Q. During my interview with you, at some point, I asked you questions about what your assumptions were as to what happened during the shooting. Do you recall that?

A. Vaguely, yes.

Q. Okay. And I think, more or less, you told me you were – really weren't too concerned about the mechanics of the shooting because it didn't have a lot to do with ultimately your conclusions in this case. Is that a fair statement?

A. I said something to that effect regarding what [117] the prosecutors from Coconino County related to me.

Q. Right. And you've more or less told us this, but in developing the history that you have, one of the things that is relevant here is what context Eric put this shooting in. Is that a fair statement?

A. Yes.

Q. And what we have to do – what Judge Coker ultimately has to do in this case is, he has to look at objectively the facts that have been developed in order to try to decipher what Eric's internal reality was. Is that a fair statement?

A. That's a fair statement.

Q. And one of the methods or procedures that you used in that development was what's called the global assessment of functioning scale. Correct?

A. Correct.

Q. And you've told us that this scale is used by mental health clinicians for the purpose of determining someone's global functioning versus specific functioning. Correct?

A. Correct.

Q. And as we move down the scale – and I will put the scale up here in just a second – as we look at the scale as a clinician, again, what the standard procedures are in putting someone within a certain [118] category is to keep moving down the scale until the absolute worst symptom is shown according to the scale and not shown in the next one below it?

A. Correct, more or less.

Q. I may need to dim the lights just a little bit. Thanks, Josh. Whoops. If we need to get a better copy we will at some point.

Doctor, first of all, your rating of Eric was a 31?

A. Correct.

Q. That's a pretty low score, isn't it?

A. Yes.

Q. And, for example, when we're looking here at 31, 40 to 31, which is the category you put Eric in at the time of the shooting, there is discussions about that that behavior – there's some impairment in reality testing or communication. Correct?

A. Correct.

Q. And there's some major impairment in civil areas such as work, school, family relations, et cetera?

A. Correct.

Q. And, clearly, Eric displayed all of those symptoms?

A. To some extent, yes.

Q. Well, you put him at the lower end of the [119] scale. Correct?

A. Correct.

Q. Okay. And then we get into the 31 to 20 range here, and it talks about behavior is considerably influenced by delusions, hallucinations or serious impairment. Right?

A. Correct.

Q. So it's an inability to function in almost all areas; stays in bed, no job, home or friends.

A. Correct.

Q. Correct?

A. Yes.

Q. Let me ask you, with a score of 31, do you believe Eric should have been committed under a Title 36 proceeding?

A. Yes.

Q. And, Doctor, I don't know that – I know during our interview you were asked about what his GAF score was in admission to Aspen Hill. Correct?

A. Correct.

Q. And that was a 30?

A. Correct.

Q. Let me ask you, are you aware that at the Title 36 proceeding, Dr. Shelley Everley GAF'd him at 20?

A. I probably read that but it wasn't in my mind [120] until you just reminded me.

Q. Okay. And I have the documents if you need to look at them, so if at any point you think I'm being unclear or you need to reference it, please let me know.

A. Was she assigning that score for the time she saw him in jail or at the time of the crime?

Q. I'll show you. This is Aspen Hill, and he – the GAF is 30 there, and that was – that was one year prior to the shooting. Correct?

A. Yes.

Q. This is Dr. Everley's – Dr. Everley's GAF is 20, and she did not render an opinion as to the time of the shooting. This would have been dated 8-31, several months after his incarceration.

A. Okay.

Q. Okay. And then when he was admitted to the Arizona State Hospital, then, after being determined to be – to be incompetent the first time, his GAF was 31.

A. Okay.

Q. And the date of that is 4-3-01, I think it's – there it is, 4-2-01.

A. Okay.

THE COURT: Counsel, just – I didn't get the number of the doctor that did the Title 36 placed him in the GAF of what?

[121] MR. MIDDLEBROOK: 20.

THE COURT: Okay. Thank you.

Q. BY MR. MIDDLEBROOK: All right. Certainly, in determining what Eric's ability to function or that – as far as that relates to this particular scale, one of the things in looking to whether he should have been lowered into this 30 to 21 range would be whether his behavior was considerably influenced by delusions. Correct?

A. Correct.

Q. And one of the things that you would do in looking at that is whether his acts were grossly inappropriate. Correct?

A. Correct.

Q. And one of the things that this tells us is that?

THE COURT: "This," counsel?

MR. MIDDLEBROOK: This scale.

THE COURT: Okay. Thank you. I just need that for the record.

MR. MIDDLEBROOK: Thank you.

Q. BY MR. MIDDLEBROOK: What this scale tells us is that the person has no job or no friends?

A. Correct.

Q. And we know that Eric had no job and no friends as of 6-22, don't we?

[122] A. Technically, his parents were paying him $80 a week to do chores.

Q. Okay. Technically, but he was basically unable to do those tasks. You're aware of that?

A. Correct.

Q. And we certainly know because of the number of witnesses that have testified in here before, he would sit alone at high school on a bench by himself day in and day out. Is that the history that you have?

A. I have read that report.

Q. This was – I'm talking about testimony in this case as opposed to reports.

A. Yes.

Q. Would you agree that that's reflective of someone who has no friends?

A. Could be.

Q. And when his brother, Gentry, was interviewed by the police, Gentry told them, I basically don't know who his friends are anymore. No one hung out with him anymore. His best friend, Victor Meza, said, I quit hanging out with Eric months before this. You're aware of that testimony?

A. Yes.

Q. Okay. And you told me during your interview that while you did GAF him at 31, that Eric being pulled [123] over by the police could lower it by a couple of points?

A. Correct.

Q. So that would put him at 29 or 30. Correct?

A. In that range, yes.

Q. All right. In determining whether he was at 20, between 20 and 11, we look to see whether there was some danger of hurting self or others, occasionally fails to maintain minimal personal hygiene or there's a gross impairment in communication. Correct?

A. Correct.

Q. Okay. And one of the facts – some of the facts in looking at Eric's ability to function on the day of the

shooting would include, for example, knowing that just several days before at the Fitzhugh party he had been involved with a fight with a kid who basically said only that Eric changed, and Eric suddenly flipped out and punched him, broke his nose?

A. That's correct.

Q. We know that his mother the day – days before this shooting was earnestly, frantically searching for mental health professionals to have him committed?

A. Correct.

Q. And we know that through – that the county attorney's office was contacted and begged to prosecute for the purpose of forcing Eric into some type of mental [124] health counseling. Are you aware of that, as well?

A. Insofar as she said that she asked you to contact the county attorney's office.

Q. Well, I can assure you I did, and there is a stipulation that Judge Coker has that, in fact, I did do that.

A. Okay.

Q. Okay. When we're talking about acting grossly inappropriate here in this lower range – or excuse me – in this lower range, some danger of hurting self or others, we have to consider the fact that Eric was carrying weapons for months at a time. Do you know that?

A. Yes.

Q. Okay. And just – I don't know whether you know this. Are you aware that when he was arrested for DUI drugs, when the officer was searching him and taking

items off of him – now, remember, Eric went to a senior ditch day party. Right?

A. Correct. Yes.

Q. He had on him a can of pepper spray locked and loaded ready to go. Did you know that?

A. Yes, I did.

Q. Did you know he also had several knives, a club in his car with him?

A. I was aware of the special forces knife.

[125] Q. Okay. And are you aware also he had his bird?

A. Yes.

Q. You're also aware days before the shooting that – well, excuse me – the day before the shooting Eric's hygiene was extremely poor?

A. In some regards, yes.

Q. Right. I mean, he wasn't washing his hair. He may have gone to the athletic club to shower but he wasn't washing his hair. His hair was getting worse and worse. Are you aware of that?

Q. That's what his mother said.

Q. He was wearing – at the time of his arrest he was wearing multiple layers of clothing?

A. Correct.

Q. His clothing he was wearing for days on end?

A. Correct.

Q. And the evening before the shooting Eric told Adam Lozano, I've got mental problems?

A. Correct.

Q. Pretty unusual here that that statement would be made by Eric since after that and before that he never said he had any type of mental problems, did he?

A. I don't remember that statement. I suppose I thought – he said something to his mother at one point about he thought he had problems and she said, let's get [126] help, and he refused.

Q. Right. And then after that, after his post arrest, he's continually advocated that there is nothing wrong with him?

A. That's correct.

Q. That his mother says bad things when she says he's got schizophrenia?

A. Correct.

Q. His medication compliance is always kind of resistant because he doesn't believe anything is wrong with him?

A. Correct.

Q. In assessing the score that you did, one of the things that you told me during our interview was you thought it was significant that he was dating Nicole Benally just within six weeks of this shooting.

A. Correct.

Q. Did you rely on the police report for that fact or did you rely on Nicole Benally's transcript of her statement to the police as to that effect?

A. I don't recall.

Q. Okay. I will tell you now, Doctor, the police report reflects just as you stated.

A. Okay.

Q. Let me hand to you what's been marked as [127] Exhibit 101. And that is a transcript that I just received during the middle of this trial of Nicole Benally's actual statement to the police.

A. Okay.

Q. Okay. Let me ask you, have you ever reviewed it?

A. No.

Q. Turn to page 13.

A. Okay.

Q. Have you had time to look at page 13?

A. Yes.

Q. I'm going to paraphrase here, but starting at about page – or line seven, it says: And what year are we talking about, '99 to 2000 or '98 to '99? And she's referencing that her dating Eric, '98 to '99.

And then we drop down to lines 14 through 19: So that was basketball season, September to December of '98?

Uh-huh.

And when did you date him during that period?

Yeah.

So it's actually not just a few weeks before, as the police report indicates, but almost a year before – back up, more than a year before. Correct?

[128] A. According to this, that's correct.

Q. Okay. Let's also turn – during this period of dating, I'd like you to turn to page eight where she discusses some of the things they talked about. Lines 16 through five (sic) says: Okay. So just let me ask you just a few more questions and we'll get off this topic. First of all, it also says here Nicole told me that the officer that that's – the officer that Eric often talked of suicide and he told her he would do so by slitting his throat. Do you remember her – do you remember telling her that?

Uh-huh.

Did Eric talk to you about things like that?

Every – like he would do hints about it and stuff, and one time he just did – he did just flat out say.

Do you see that?

A. Yeah.

Q. That was not considered by you in your report, was it?

A. No. This is the first I have read this.

Q. And should it come up, I don't know if Mr. Powell will ask you these questions but I'm going to cover it just in case – Mr. Powell was asking a [129] particular witness that Eric had somehow dated Nancy Edmondson in late April. And, actually, I want to tell you what her testimony

was. She came over to his house, Eric's house. She had known Eric for a long time. And when they got to his bedroom, his whole demeanor suddenly changed, and he – and she's pregnant. She's about six months pregnant, and he starts asking her questions like, I wonder what it's like to have sex with a pregnant click. I wonder – or started asking her, are you afraid to die? Then as they were leaving, as she, you know, says, I need to get out of here, I got to leave, he strung his room up with strings and did all of that. And when he finally dropped her off and he leaves, she starts crying and shaking. Okay. That's the extent of any kind of dating that I'm aware of that Eric participated in within months of this shooting. Are you aware of those facts?

A. I was aware that what I read about Nancy Edmondson is that when they got back to his room and his sister left is when he started to be weird.

Q. Correct. Clearly, not the dating social interactivity you would expect of a normal teenager. Correct?

A. Outside that range, yes.

Q. And you're aware because we specifically [130] discussed the Aspen Hill – what I call the Aspen Hill arrest, where Eric was arrested then subsequently admitted into Aspen Hill?

A. Correct.

Q. Do you remember us discussing that specific?

A. Yes.

Q. Okay. During that interview with you, Doctor, you told me that you did not believe that under those circumstances that Eric would have been or should have been committed pursuant to a Title 36 proceeding. Do you recall that?

A. I don't recall right now, but I accept your word for it.

Q. Okay. That is in your interview, pages 59 through 63, if you do decide to look at that. But, basically, I was questioning you about Eric's sudden mood changes from laughing to crying, that type of behavior.

A. Okay.

Q. Correct?

A. Yes.

Q. And I was asking you about the symptomatology of schizophrenia; that being unanticipated, being unable to predict their likelihood of violence, and I was using that as an example. Right?

A. Yes.

[131] Q. And you told me you didn't think that was a good example.

A. Okay.

Q. Do you remember that? Is that more or less what you remember?

A. I think so.

Q. Okay. And, yet, we know that his father asked the police to arrest him after Eric swore at him and the look in Eric's eyes changed. Right?

A. Correct.

Q. And we know he was then committed to Aspen Hill for the next three days?

A. I think he was admitted. I think the term committed is actually a legal term. I don't think he was officially committed.

Q. Right. But we know at that time he was – he was GAF'd at 30?

A. Correct.

Q. Just under those facts. Correct?

A. Yes.

Q. And that was prior to Eric carrying – apparently carrying knives continuously, carrying guns continuously. Correct?

A. As far as we know, that's correct.

Q. I would like to turn to your diagnosis under [132] Axis II, personality disorder diagnosis. Okay?

A. Okay.

Q. I think you would agree with me that DSM-IV specifically says that a personality disorder, the key feature is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture?

A. Correct.

Q. And you're saying that because Eric did something in the 5th grade and a single incident in the 7th grade, that established a personality disorder?

A. No. I think there's more to it than that.

Q. Well, let me ask you this: This personality disorder, again, DSM-III comments that he is inflexible, it crosses social academic and familial boundaries. Correct?

A. It can, yes.

Q. I mean, that is the key component, is it never – it's rigid; it is an enduring pattern. Correct?

A. That's correct.

Q. And, yet, we know that in the 8th grade there was apparently no problems with Eric, right, academically, at home, no major blowups. Right?

A. It did prove that, yes.

Q. Lois Wells told us in the 9th grade she hardly [133] knew Eric was there because there was no problems with him?

A. Correct.

Q. He was popular. He was elected home coming king.

A. Uh-huh.

Q. Freshman homecoming king.

A. Okay.

Q. And that in the 10th grade more or less the same thing. We don't – that's not an enduring pattern. Right?

A. Well, the issue I think would be whether it's a developing pattern

Q. And we know that schizophrenia, once the full-blown schizophrenia takes place, it's almost impossible to diagnose a personality disorder at that point?

A. It's very difficult.

Q. And you told me that you believed Eric had paranoid schizophrenia at least from his Aspen Hill admission in 1999?

A. Correct.

Q. You talked about the MMPI, the SIRS, SIRS testing, et cetera. Correct?

A. Correct.

[134] Q. Mr. Powell may have asked you this in all fairness but I don't recall. All of that testing as a clinician you must use very cautiously under circumstances like this?

A. Correct.

Q. And while the testing – you would agree that your testing gave a valid profile?

A. Correct.

Q. And that that profile includes, among other things, that Eric is quite disturbed psychologically?

A. Correct.

Q. He appears sullen?

A. Yes.

Q. He's overtly paranoid?

A. Yes.

Q. He has extreme bizarre thoughts?

A. Yes.

Q. And he believes in special mystical powers?

A. Yes.

Q. Under the Megargee Type H offender classification with the MMPI, Eric would be one of the most seriously disturbed inmates under the testing you provided?

A. Correct.

Q. He would be thought of as a crazy among other [135] inmates?

A. Correct.

Q. And this was all while – all while Eric was dosed with Haldol?

A. Correct.

Q. To be fair here, Dr. Moran, when you were discussing that Eric's beliefs in aliens and why he was believing in aliens and things like that, Eric never once attempted to use his belief in aliens as any type of excuse for his – for any of his behaviors?

A. That's correct.

Q. And that, the fact that Eric is not using that as an excuse, really kind of cuts both ways; it could be just as reflective as to the level of his psychosis. Correct?

A. Yes.

Q. The fact that he hides it, that he doesn't want people to know about it, could very well be reflective on the severity of symptoms he was suffering?

A. Yes.

Q. Let's get back to maybe some things we can agree to, Doctor.

A. Okay.

Q. You agree that at the time of the shooting Eric was delusional?

[136] A. Yes.

Q. And at the time of the shooting his delusions were persistent?

A. Yes.

Q. And immediately prior to the shooting we have no evidence that Eric was ever able to resist this thought pattern, these delusions?

A. Well, I suppose at times he was able to eat at home.

Q. We don't have any evidence he ever ate at home.

A. I thought that I saw in mother's report or somewhere in the data that occasionally that he would eat at home under special circumstances, though he didn't like to.

Q. If it was packaged foods, you're quite right, only if it was packaged food.

A. So that's, you know – that could be, I guess, some kind of an example of his ability to resist it.

Q. Well, he knew that the food was being poisoned at home but he believed if he ate only packaged food or out where everybody else did, right, that he couldn't be poisoned by the aliens.

A. Okay.

Q. Do you agree with that?

[137] A. Yes.

Q. Okay. And we know that Eric's entire behavior was one of complete paranoia, it was relentless?

A. It was continuous.

Q. Yeah. And those are the words you use, continuous?

A. Correct.

Q. And I asked you, 24 hours a day? And you said, 24 hours a day.

A. Correct.

Q. And you would agree that someone who's psychotic has a much lesser resistance to stressors in life?

A. Yes.

Q. And that, thus, are unable to perceive alternatives as readily as someone who is not psychotic?

A. I agree.

Q. And when Judge Coker reviews all of this evidence and when he's considering the severity of Eric's psychosis, one of the things that I think, would you agree,

would be fair for him to consider is that Eric's moods could change very suddenly?

A. I agree.

Q. With almost minimal or no provocation?

A. Correct.

[138] Q. For example, his best friend, Victor Meza, told us in court that Eric attempted to strangle him one time and within seconds of getting out of the car Eric's face was blank and he had no idea what had just happened, that would be something for Judge Coker to consider?

A. Yes.

Q. Another occasion was Aaron Fitzhugh, the person who threw the party in which Eric attended and hit Brandon Matje in the face, said that when he pulled Eric off Brandon, his face was confused, his eyes were blank, and he was staring right through me and it looked like he had no idea what was going on. You never considered that, did you?

A. I think I remember, if it was in the police reports I –

Q. It wasn't.

A. Okay.

Q. So you didn't consider that, and that's just days ahead of this shooting. Right?

A. I wasn't aware of that information.

Q. Okay. And then there's the incident where he – Terry Clark takes Eric to Wal-Mart to purchase a heater, and when Eric cannot find a heater in April or May at

Wal-Mart he spins on her, cusses at her, and by the time they get home, Eric is kind of dumfounded when [139] his dad confronts him about it. Those are things to consider in looking at Eric's severity of symptoms. Correct?

A. Yes.

Q. And the reason those are important is because it reflects on anyone's ability to predict violence of a schizophrenic?

A. Fair enough.

Q. You mentioned a book that you relied on, and I believe it's called Conducting Insanity Evaluations. Correct?

A. Correct.

Q. Within that book one of the criteria, one of the things they want a clinician to look at is whether or not a patient – or excuse me – a defendant has engaged in any type of prefatory behavior in getting involved in the criminal act, violent act that occurs. Right?

A. Correct.

Q. Do you recall me asking you specifically during your interview whether you believed Eric had engaged in any type of prefatory act?

A. I vaguely remember the question. I don't remember my response.

Q. Your response was, no, I don't know of any.

A. Okay.

[140] Q. Okay. Is that still your testimony today?

A. Whether I think he engaged in any prefatory acts, I would say I don't know. It's possible.

Q. All right. So when the prosecutor is asking you questions about Eric going home, getting the keys, all this other stuff, I mean, to be fair here, Doctor, you told me you had no idea whether Eric had engaged in any type of prefatory actions. Correct?

A. At that time, that's what I said.

Q. Okay. You're aware, again, because of the April 24th DUI drug arrest, that Eric – this cannot even be remotely argued – was in any way trying to contact the police. Right?

A. When he was arrested in April?

Q. Correct.

A. I agree with that.

Q. Yeah. And, yet, we know that he has pepper spray on him ready to go, knives next to him, clubs, that type of stuff. Right?

A. Yes.

Q. And I think you told me or I asked you, excuse me, the significance in your mind of Eric's circling with this loud music going on and on and on, and you told me you did not believe that that was a prefatory act either?

A. At that time I said that.

[141] Q. Okay. You were telling me the truth at the time?

A. That's what I thought at that time.

Q. Okay. And looking at the severity at the time of the shooting, a clinician would also look at post arrest behaviors. Correct?

A. I would say arrest behaviors.

Q. Post arrest behaviors?

A. I have trouble with post arrest behaviors.

Q. Well, in the book, Conducting Insanity Evaluations, one of the things they do want you to consider is post arrest behaviors. Correct?

A. Okay.

Q. Is that your understanding of how that book wants you to make the evaluation?

A. I accept that.

Q. Okay. And I note that when you were looking through the Coconino County Jail records, that you summarized some of those records that were provided to you?

A. Yes.

Q. Are you aware that within – within those records, for example, Eric would talk to himself about needing to save everyone from aliens?

A. I don't remember that.

[142] Q. All right.

THE COURT: Mr. Powell, Mr. Middlebrook is like me trying to change channels. Would you see if you can help him?

MR. POWELL: This is the blind leading the blind here.

Q. BY MR. MIDDLEBROOK: And just so that we can relate ourselves to time as to when this occurred, you can see, for example, 3rd of September, 2nd of September and the end of August –

THE COURT: Speak up a little bit, Mr. Middlebrook.

Q. BY MR. MIDDLEBROOK: We can see that this is basically the end of August, first part of September. Correct?

A. Right.

Q. And we see that – at least it's noted that on swing shift he was talking to himself about aliens, we need to save everybody from the aliens. And then on the day shift the next day it says, come help Godzilla and the boys. Aliens are taking over. I'm being held on an alien base. Most white people are aliens.

Do you see that?

A. Yes.

Q. And the one above it at the end of August, I [143] just simply – today he was very cooperative and then became hostile.

A. Okay.

Q. Okay. Thank you, Josh.

I would like – I think you reviewed Terry Clark's chronology. And right around this same time Eric told them Aaron's story where, as you know, he related that

Flagstaff's a celestial city for aliens, that basically they were everywhere and that only bullets can stop aliens. Correct? Is that what you recall of that story?

A. Yes.

Q. You were talking about looking at whether Eric ran away –

A. Yes.

Q. – from the – from the scene of this shooting. Correct?

A. Correct.

Q. Well, one thing that many witnesses have testified to on when the state was calling them was that there were some gunshots and then there was a pause and then there was some loud gunshots, apparently by Officer Moritz. Okay?

A. Okay.

Q. Do you think that it's reasonable that someone [144] who was shot at would run from the scene?

A. Yes.

Q. Okay. Also, when I was – is it fair to say that Eric running from the scene is also consistent with his theme, that aliens were infesting Flagstaff, he was running from them?

A. Might be.

Q. All right. I mean, to be fair here, we don't know?

A. We don't know.

Q. But it's certainly something that has to be considered?

A. Yes.

Q. And when we talk about when Eric is out, and I think that the prosecution has said, eluded the police, their massive manhunt, what we know from the state's case is that Eric hid in the shed, went to the bathroom in it, and as to the guns, he basically threw them down on the ground next to things that were very easily found within a few days of the shooting. You know that?

A. Yes.

Q. I mean, there was no complex scheme of hiding the murder weapon or anything like that. Do you recognize that?

A. Yes.

[145] Q. Okay. And I thought I heard on your direct testimony today, and I apologize if – or if I stand corrected, please correct me – but I thought you said that when Eric basically came walking back home, that you thought he was trying to hide the murder weapon at that time and that's why he – he ran from the police?

A. No, I don't think I said that.

Q. Okay. All right. Because you understand that the extent of him hiding out is he is out in a shed and the next thing we know, at least initially, he's kind of walking around back home; he's not trying to get out of town, he's not, you know, getting on buses, he's not doing anything like that; he comes back home?

A. Right. He's observed –

THE COURT: I'm sorry, sir?

THE WITNESS: He's observed by his house.

Q. BY MR. MIDDLEBROOK: Correct. But it's no complexity to him coming back home. Correct?

A. We don't know what was going through his mind.

Q. Yeah. And when he's thrown down on the ground, one of the things that you noted in your summary was that he makes a statement, what's this about? What are you doing? You know, why do you want to talk to me? Right?

A. Right.

[146] Q. And then we know that when he goes to the police station, that you characterized his actions at the police station as clearly disturbed?

A. Yes.

Q. And when he subsequently tells you this Sarah story, he's going – this alibi theory of his of, you know, I was at this movie theater all night, Sarah picks me up and we – and he's waiting at a bus stop, apparently, and they drive to Lake Powell that night. Right?

A. Right.

Q. Was – Eric's already got his bathing suit on?

A. Yes. He said he did.

Q. Yeah. You told me that you thought that would basically confirm the schizophrenia, his lack of insight?

A. It would seem to be an example of a profound lack of insight.

Q. I asked you during your interview – well, let me ask you this: I believe that you were asked what was Eric's motive in being involved in this shooting, and you basically said you didn't really give it much thought. Is that a fair statement?

A. I would like to amend that.

Q. Okay. But if we look at page 78 and 79 of your interview, I can tell you, that was your answer.

[147] A. Okay.

Q. Now, to be fair here, you later come back and make a little bit of clarification because you tell us, well, you know, maybe what Desiree Barreras told us about Eric saying something about F the cops, that may have had something to do with it. Does that refresh your memory?

A. Correct.

Q. I'm going to ask you that, kind of the same question as before. When you're – first of all, Desiree Barreras has not testified in this trial.

A. Okay.

Q. Okay. And so when you – did you rely on what's contained in the police reports or did you rely on her transcripts of what she told the police?

A. Again, I'd have to reference my documents to see which one I reviewed.

Q. All right. Well, let me hand you her transcript, again, a document I just received during this trial.

A. Okay.

MR. MIDDLEBROOK: And, Judge, I have a copy if you want to follow along.

THE COURT: Is there any objection? Is there any objection to the Court following along?

MR. POWELL: No, your Honor.

[148] THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: Let me hand to you what's been marked Exhibit Number 102, and why don't you just take a minute and glance through that document and see if you've ever seen it.

A. I don't think so.

Q. Yes, you did, or, no, you didn't?

A. I did not.

Q. Okay. Well, I'd like to tell you, again, I've reviewed the police reports and I understand why there may be some confusion here, because in the police reports it does not indicate that Miss Barreras talked very extensively about Clinton Ezell committing this murder, this shooting. But let's turn to her statement. I'd like to first have you turn to page 10.

A. Okay.

Q. And this – I believe this part of the statement is what you're relying on where she says, Eric said he would, shit, like fuck the cops, you know.

And that's towards the very end of that statement. Do you see that?

A. I see that.

Q. Look at line 20. Actually, what she's saying is, what did Anthony say about what Eric was making comments about the police officers, not what she heard, [149] right, of the question she was answering?

A. I mean, her response is, like Eric even made comments to everybody, you know, so –

Q. But she's asking, and what did Anthony say about Eric. Right?

A. Right, but I don't think its clear that she's referring only to Anthony but Eric talked to a lot of people.

Q. All right. Even though that was the question asked?

A. That was the question asked.

Q. All right. Turn to page 11, the very end of it: But then like after that, I was just like whatever. And that day when they had – just as they had done it, like, they waited for it to kick in and stuff, and then like he was talking all kinds of shit. He was like – he was just like, ah, yeah, fuck the cops, fuck them all, all this stuff, I'm going to kick their ass if I get pulled over. We'll see. And I'm like, what?

Right?

A. Yes.

Q. And that's what you basically attributed Eric saying?

A. Yes.

Q. Why don't we turn to page 13. He apparently [150] made those statements before he was arrested for the DUI. Are you aware of that?

A. I accept it.

Q. All right. Well, I can tell you that if we look at page 12 at the bottom, it says, they had thrown the stuff in there, so I'm sure I could get in there and find the stuff and it was about a week before he got pulled over for the DUI. Ah, yeah.

And then, actually, if you look at line two, when was – when was he making those statements? Line two says, he got pulled over like the next week for DUI.

Okay?

A. Okay.

Q. So we know that if he said this statement, that it was the week before the DUI. Right?

A. Right.

Q. And when he was being arrested or when he was arrested, the police officer walked up to him and Eric said, I've been waiting 20 minutes here for you.

Did you know that?

A. I didn't know that.

Q. On Officer Hoyt's report – you're confusing me with details – that line I have says, Mr. Clark said: I've been waiting for you to get here so you can get me [151] out. I've been waiting for 20 minutes.

A. Okay.

Q. That was his first statement to Officer Hoyt. So we know that if he said this a week before, I mean, that was his attitude towards Officer Hoyt, I've been waiting,

right? Not, F the cops; not, I'm going to do anything crazy. Right?

A. Right.

Q. And then when we're considering the reliability of Desiree Barreras because you've relied on it and she has not testified, one of the things we have to consider is that on page 13 when she's describing Eric, she says, what did they tell you about, you know, the DUI and stuff? And he was like, well, they told me if I get in trouble again, I'm going up the river and stuff. Uh-huh. So I've got to stay clean and stuff. And like I was like, well, yeah, you know. I was like, you should ask your parents to put you like in rehabilitation or something. And I was like, you know, so you don't have to go to jail. I was all, because that's going to suck. Right? He has a real gay voice. And so I don't like basically come out and say that you're going to be raped but, you know, basically that's what I told him.

Do you see that?

[152] A. Uh-huh.

THE COURT: You have to say yes or no.

THE WITNESS: Yes.

THE COURT: Thank you.

Q. BY MR. MIDDLEBROOK: And then turning to page 14, lines 13 through 16, and like I told the officer it was like there's weird things about Eric, you know. Uh-huh. Like he wasn't so much obsessed with death. And Clinton was, you know. And then she goes on, and I can tell you, talks about – looking at page 15, that Clint told me – Clint told me – and this is lines four through six at

page 15 – Clint told me, he was like fuck that. I would have shot that cop. I would have killed him. I was like, no way. Right?

Do you see that?

A. Yes.

Q. Did you consider that in your consideration that what Desiree was saying Eric said?

A. Well, the police reports had said that Clint – she said that Clint had more of an anticop attitude than Eric did.

Q. And we can see that, because further down that page, line 17 through the bottom says: This is Clint speaking. Right? Yeah, Clint. He would be like, fuck that. This cop stopped me and I'm fucking just kept [153] going. Fuck that. I'm not stopping for no cop because I have some wreckage, you know, and then I have pot. Fuck that. I have to kill him if they stop me, if they caught me. And that was like, what?

She's talking about Clint, not Eric. Right?

A. Yes.

Q. All right. Because I'd like for you to turn to page 22 of the statement that you have not considered, lines 16 through 22, and it – she never like – like when we heard or like when we both heard that, you know, this might be Eric, we both never thought it. Right? We both thought like, when we heard it was Clint, we were both like, Clint did it.

You guys were thinking more Clint than Eric?

Right, yeah, because we know Eric and we know Eric's personality.

See that?

A. Yes.

Q. All right. Let me have you turn to page 31, lines 15 through 23: And he doesn't have a girlfriend or – so who is – who is girlfriend? He doesn't have a girlfriend. He doesn't have one. No. No. Nobody would touch him honestly. Okay. No. Like I told the other [154] cop, this may sound weird, but I'm so honest when I – I said he sounds gay when we talks.

Uh-huh.

If you ever listen to him talk or you get to hear him talk.

Uh-huh.

And the other officer on the force is going to be like what? Do you think he was? Did he – was he with any men? No, he wasn't. I totally – I don't know if he was like totally was. I think maybe he was bisexual.

You didn't consider that by Desiree either. Right?

A. No.

Q. And then let's turn to her opinion as to Eric, page 41. And, actually, to be fair here, let's go – we'll start at the end of page 46. Are you with me?

A. Yes.

Q. Okay. This is Desiree Barreras. I'm going to tell the truth. I'm not going to. Right on. And what's it all

about? I'm like, if Eric did it, Eric did it, I think he's got to take responsibility for it. Yes, I think he did it, like he killed the officer. He was high. Yeah. Well, honestly, he had to be because Eric didn't have the guts. I mean, honestly, he didn't have [155] the guts. I don't even have the guts. Like one time I got pissed off at him, I pushed him and I was like, you freaking fag, get away. Uh-huh.

You didn't consider that?

A. That was in the police reports.

Q. Okay. And like if he didn't have the guts to do anything to me – lines nine through 10 – he doesn't have the guts to shoot a cop.

You didn't consider that in determining what level of psychosis Eric was suffering, did you?

A. Line nine and 10?

Q. Yeah.

A. No, I didn't consider that.

Q. Because that's not in the police reports, is it?

A. No.

Q. And, I'm sorry, but we were talking about Eric's motive and you had relied on what Desiree Barreras had said, and so I'm kind of going to have to go through that a little bit more at length. Dr. Moran, when I was asking you about what Eric's motives were in being involved in this, is it fair to state or say – excuse me – you did not tell me anything about the Thorpe Park people and what they had said?

A. I will take your word for that.

[156] Q. Okay. Let me ask you, though, are you aware, because you've reviewed numerous documents after I interviewed you – are you aware there is trial testimony that both of the people that testified as to what occurred there basically said no one took Eric seriously? Were you aware of that?

A. I don't think I saw the trial testimony.

Q. All right. But – and that wasn't my question. I'm trying to find out if the prosecution ever made you aware that no one at the park ever considered it to be serious.

A. I think this is the first I have heard that.

Q. All right. And that when Eric made this statement, everyone said he wasn't right. He was under the influence, he may have been under the influence of something. Are you aware of that?

A. Yes.

Q. Yeah. And are you also aware that they testified that Eric did not appreciate what he was saying, what effect it would have on people? Are you aware that that's what they also said?

A. No, I hadn't heard that.

Q. Okay. I can see I'm never going to get this done so I'm just going to keep going. Let's talk about some of the things that – did you consider the day [157] before the shooting – first of all, you're aware that Eric or that basically his mom reports that Eric was asleep (sic) at about 9:15 and in a good mood that day?

A. Yes.

Q. And that at least her description, as well as Dave Clark's description, was that Eric was more or less normal?

A. Yes.

Q. But they've testified what they meant by what was normal for Eric?

A. Right.

Q. And you considered that normal for Eric. Eric was certainly not normal?

A. I have considered that.

Q. Okay. And we also know that that day Terry is out trying to get him committed?

A. Yes.

Q. All right. We also know that Adam Lozano says late in the afternoon, at about 5:00 to 5:30, which would be about the same time Eric went to the athletic club, Eric – that Adam Lozano testified – he said that Eric told me he had mental problems, but he was almost incoherent in his speech. Are you aware of that?

A. I was aware that he said he had mental problems. I don't remember it being at 5:00 or 5:30. I [158] think I remember he thought he was high on something. He wasn't very coherent.

Q. Well, he told us here it was about 5:00 or 5:30, and he told us it was incoherent speech.

A. Okay.

Q. Okay. You didn't consider that?

A. I hadn't known that.

Q. Okay. When Eric went to Sizzler we have to remember he went there because he believed the food was poisoned at home. Right?

A. That's correct.

Q. And when he went to the Texaco later – or excuse me – earlier or later, I don't remember now, that he went to get bottled water or bottled drink because, again, he believed his food was poisoned at home?

A. Correct.

Q. And that he went to shower at the club because he believed the water at home was poisoned?

A. Probably so.

Q. We also know from your interview with Dave Clark that when Eric was watching the show, the Shaft show, that his eyes were kind of just wandering around on the screen. Right?

A. His father made a comment to that effect.

Q. Yeah. Did you, in reviewing documents, go [159] over the interview of Carden Hakes?

A. Again please.

Q. Have you seen the interview of Carden Hakes?

A. Carland?

Q. Carden, C-a-r-d-e-n, Hakes, H-a-k-e-s.

A. Is it in my documents?

Q. It's not.

A. No, I haven't.

Q. Police report just simply states, saw Eric at the show. That's it. Okay?

A. Okay.

Q. Carden testified – and, again, this was a transcript that was provided to me in the middle of this trial. If you need to, I'll show it to you. But do you recall seeing any transcript of an interview with Carden Hakes?

A. No, I don't.

Q. All right. He testified he did see Eric at the Harkin's Theater and saw him with his parents late at night. He thought the time was about 10:00 p.m.

A. Okay.

Q. Okay. He said he thought Eric was under the influence.

A. Okay.

Q. You did not consider that, did you?

[160] A. No.

Q. He said something didn't look right. Okay?

A. Okay.

Q. In reviewing your report – excuse me.

In reviewing your report and your outlining the facts that you considered on the day before the shooting, you mentioned the name Susan Rinck. Do you remember her name? And let me just orient you. She's the one who initially heard this loud music, this person in this truck.

A. Yes, I believe so.

Q. And she's the one who ultimately called the police, if that helps refresh your memory.

A. Okay.

Q. In review of your report, you did not put in there that Ms. Rinck believed or saw the driver at about 4:30 a.m. and he had a wild-eyed look, an evil look in his eyes.

A. That's what she said.

Q. Did you consider that?

A. Yes.

Q. Did you consider that Mike Greenway, who testified in this trial, told us the driver had a wild-eyed look?

A. Yes.

[161] Q. Okay. And then did you consider the fact that Mr. Cupp, who is the witness who remembers Eric or counting up the 21 laps, more or less, told us in trial that in viewing the driver or the person driving this truck, he saw no impairment of driving?

A. That's the first I've heard that.

Q. Okay. Because one of the things that you conclude as to why Eric could not have had a sudden and rapid decompensation is because you – and you attribute it to that if he did, that it had to be related somehow to drug use. Correct?

A. No. I think I said it had to be some stressor.

Q. Okay. But you would agree with me that there was no marijuana found in the truck?

A. Just residue.

Q. Right. That the pipe was a mixed DNA of Eric and someone else?

A. Of a female.

Q. Okay. And in reviewing the police reports as it related to the time – or excuse me – at the time of the shooting, as well as meetings with the prosecutors when they were telling you blow by blow about what occurred during the shooting –

A. Okay.

Q. – did anyone ever tell you they smelled [162] marijuana in the truck?

A. Not that I recall.

Q. Okay. Right after Eric's arrest you're aware, you viewed the videotape, of Eric sitting in an interrogation room, his hands are cuffed behind his back and he's kind of mumbling, singing to himself?

A. Yes.

Q. And I think you told me that you thought that it was clearly disturbed behavior when he – especially when he's kind of singing to himself things like, why do you have a problem with me? I mean, poison me? What the fuck does that do? Take me away. I want to go away.

A. Correct.

Q. Doctor, do you have any evidence that Eric ever had his paranoia in check, that he was able to deal with it in a rational fashion?

A. I would phrase it that he was able to deal with the world in a rational fashion to some extent, though he was paranoid.

Q. And you'd agree with me that his behaviors, as it leads up to this shooting, occurred in a meaningly fashion?

A. I'm sorry?

Q. His behavior –

A. Occurred?

[163] Q. – in a meaningful fashion. Excuse me. The symptoms of his schizophrenia are occurring in a meaningful fashion as it relates to this shooting.

A. I don't think I know what you mean by that question.

Q. All right. Well, you noted in your report when you'd made the diagnosis that Eric has paranoid schizophrenia.

A. Yes.

Q. That his behaviors were continuously escalating. Correct? Page 56.

A. Where does it say continuously escalating?

Q. I hope we have the same page numbers. First paragraph that is under discussion.

A. Uh-huh.

THE COURT: I'm sorry. Where are you referring to?

MR. MIDDLEBROOK: Page 56 under the heading discussion. And then I assume, hopefully, we're all on the same page, literally.

Q. BY MR. MIDDLEBROOK: Does the word discussion occur on line 10?

A. Yes, for me.

Q. Okay.

THE COURT: Yes.

[164] Q. BY MR. MIDDLEBROOK: Let's turn down to the very last sentence, in the year between his discharge from Aspen Hill until the shooting of Officer Moritz, the defendant's illness appears to have been on a course of gradual and continuous intensification.

A. Yes. That's what it says.

THE COURT: Counsel. I'm sorry.

MR. MIDDLEBROOK: Very last line, Judge, lines 17 through 19, and I will read that sentence again. In the year between his discharge from Aspen Hill Hospital until the shooting of Officer Moritz, the defendant's illness appears to have been on a course of gradual and continuous intensification.

THE COURT: I see it.

Q. BY MR. MIDDLEBROOK: And you told me previously that his symptoms were continuous 24 hours a day?

A. Yes.

Q. And when we're – when Judge Coker is considering the severity of symptoms Eric was suffering at the time of the shooting, would you agree with me that the following is reflective on the severity of Eric's delusional state: One, that his paranoid schizophrenia was chronic?

A. Yes.

[165] Q. Continuous?

A. Same thing.

Q. Yeah. That his voice changed to this female type voice?

A. I don't know what the meaning of that is.

Q. All right. That he went from a popular athlete to a loner?

A. Yes. That's a reflection of the presence of intensity of the disorder.

Q. Okay. That he repeatedly made statements to the effect, I can't handle it anymore. I want to go to heaven, to his mother?

A. That reflects the presence of a disorder.

Q. That his appearance changed from being a very sharp, snappy dresser to pretty odd, disheveled?

A. That reflects the presence of a disorder.

Q. He is eating and drinking only packaged food or drinking or eating out?

A. Yes.

Q. He would talk to himself at school?

A. Probably.

Q. That he would ramble to himself like a homeless man walking the street?

A. I don't remember seeing that.

Q. No, you wouldn't have because Jason Tackett [166] testified to that in court.

A. Okay.

Q. Okay. That is something to consider, though?

A. Certainly.

Q. Okay. That he had a bird in his car, strings in his car, he had weapons, which were all signs of a constant paranoia?

A. Correct.

Q. And that they are also reflective on breaks with reality?

A. Impaired reality, yes.

Q. And we don't know, nor do you, whether Eric believed Officer Moritz was an alien or not, do you?

A. Nope.

Q. But we do know Eric believed that the aliens were constantly trying to poison him?

A. Yes.

Q. That his mom and dad were aliens?

A. Yes.

Q. That the air and food and clothes that he wore were poisoned by aliens?

A. Yes.

Q. That the strings in his room, the strings in his car, the guns, the knives, the pepper spray, were devices used to protect himself against these threats?

[167] A. Appears that way.

Q. And so when we talk about Eric's theme of poisoning, we also know he has taken certain actions in an attempt to protect himself?

A. Yes, he has.

THE COURT: Counsel, we need to take our afternoon break for the court reporter. Are you just about done?

MR. MIDDLEBROOK: Judge, I am just about done.

THE COURT: Why don't you finish up?

Q. BY MR. MIDDLEBROOK: I take that back. I just remembered I have to cover Eric's statements with him that I haven't been able to.

THE COURT: All right. We'll take a brief recess this afternoon. Thank you, everyone.

MR. MIDDLEBROOK: Thank you, Judge.

(Whereupon, a recess was had from 3:13 p.m. to 3:40 p.m.)

THE COURT: Counsel, you may proceed.

MR. MIDDLEBROOK: Thank you.

Q. BY MR. MIDDLEBROOK: Dr. Moran, if you'd turn to page 35 of your report.

A. Okay.

Q. And is that the report that we were just [168] discussing?

A. Yes.

Q. Yeah. I think when we kind of got side-tracked, and what I was asking you while you were interviewing Eric, some of the statements that he made and I think that you were concerned at the point when I asked you whether Eric made the following statements, and that was that you asked him at line 23, page 35: Are there memories of specific times you thought someone was out to get you? And his response was: I'd feel my clothes and they didn't feel clean. I felt they were poisoned. I opened the door to the car, it seemed like a poison there. I'd be breathing the air and it did not seem clean, so I thought the aliens were trying to kill me a lot.

Do you see that?

A. I know that he said that to me, but I still am not on the same report that you have, so is there another copy?

THE COURT: Right here.

THE WITNESS: Okay.

THE COURT: Page 35.

THE WITNESS: Yes, I see it now. Thank you.

Q. BY MR. MIDDLEBROOK: And, if you recall – I [169] won't reference pages. Maybe we'll go through this a little faster.

Do you recall also in your discussions with Eric when he was talking to you about aliens that they basically can read your thoughts because they can know whether you're moving from the right side of your brain to the left side of your brain?

A. Yes, he said that.

Q. And he believes they're still doing research on Jupiter and Mars?

A. Yes.

Q. And he believes that aliens can put thoughts in people's heads but they have not done it to him?

A. Correct.

Q. We know that Eric's schizophrenia was symptomatic enough that immediately prior to this shooting that he was carrying weapons. Correct?

A. Yes.

Q. That he was wearing layered clothing?

A. Yes.

Q. That he believed nearly everyone was an alien?

A. I don't remember when he last said that.

Q. In Flagstaff, he believed nearly everybody in Flagstaff were aliens?

A. I think that was the generalized belief he [170] had.

Q. He believed that his air, his food and his clothes were poisoned by aliens?

A. Yes.

Q. We know that statements at the police station after his arrest are bizarre?

A. Yes.

Q. We know that he was delusional as he drove around and listened to this loud, pounding music?

A. His delusions were present then, yes.

Q. Yeah. Do you think that that was for the purpose of drowning out voices in his head?

A. That's one theory. Well, actually, that was the theory that was – I think his mother expressed about why he kept the television so loud.

Q. And your experience with schizophrenics are, they often turn up TVs loud, radios loud to drown out the voices?

A. I have encountered that.

Q. And we know that after the movie, Shaft, that – and, by the way, Shaft – in Shaft, it's a movie where some of the police officers are pretty evil guys and they end up getting shot and killed. Right?

A. Right.

Q. We know that from that moment to when Ms. [171] Rinck and Mr. Greenway see Eric, that whatever

stressor it was, it caused him to have a wild-eyed look. Right?

A. Right.

Q. Doctor, would you – you've had the opportunity to observe people who Haldol is one of the affects making them extremely drowsy?

A. Yes.

Q. Like Eric sleeping in court today?

A. I can't see him, but if he is, that might be an example.

Q. That's all the questions I have. Thank you very much, Doctor.

THE COURT: Thank you, Mr. Middlebrook. Mr. Powell.

REDIRECT EXAMINATION

BY MR. POWELL:

Q. Doctor, we've been here for quite a while today. I'd like to summarize three hours of some testimony in about two minutes if we can. Okay?

A. Okay.

Q. You don't dispute that the defendant is psychotic?

A. Correct.

Q. He was psychotic before the murder of Officer Moritz?

[172] A. Yes.

Q. Could have been psychotic at the time of the murder of Officer Moritz?

A. Yes.

Q. You don't deny or challenge the fact that actually his psychosis is schizophrenia?

A. Yes.

Q. And, again, before, during, after?

A. Yes.

Q. It was the paranoid type?

A. Yes.

Q. It was chronic?

A. Yes.

Q. Meaning continuing?

A. Yes.

Q. It was progressive to a certain extent?

A. Yes.

Q. And I believe your opinion is that its inception was sometime around 1999?

A. Yes.

Q. And the defendant may very well believe in aliens?

A. Yes.

Q. We don't dispute that?

A. No.

[173] Q. That the defendant may very well believe his parents were or may be aliens, you don't dispute that?

A. Correct.

Q. That he may be afraid of being poisoned by the aliens?

A. Correct.

Q. And just stopping there, conceding this, is it your opinion the defendant knew what he was doing was wrong at the time he killed Officer Moritz?

A. Yes.

Q. Why?

A. Because he – again, I'm looking at the information that's available to me, and that information is going to include the reports of his associates; I suppose it includes the possibility of a motivation in the shoot the cops attitude; the antisocial friends that he was hanging around with; that his behavior on that day, the last that we know of it, he was clearly able to navigate and negotiate with the world in a rational manner, even though underneath of that he did have a delusional disorder, but at the last that we know of he was rational, he was able to navigate the world; that we don't know of any specific stressor between then and the time that he shot Officer Moritz, certainly there's maybe an endless number of possibilities that exist there; but [174] we know then after he shot Officer Moritz, that he left the scene in a hurried fashion; he secluded himself, apparently trying to hide from the police; that he made some attempt to try to hide the murder weapon; and

that when he came out, he made some attempt – when he was spotted, he made some attempt to elude the police and, to some extent, was mildly resistant to their arrest.

And, so, while I certainly recognize that Mr. Clark has paranoid schizophrenia and that it existed before the disorder and after the disorder, that it seems to me, though, that the facts that we have, and emphasizing the facts, if you stick as closely as you can to them to construct your conclusion and that led him that direction, that he apparently was rational or rational enough at the time that he pulled the trigger that he was able to comprehend that his act was wrong; and, therefore, he took evasive action or strategic action, goal-directed action, engaged in the other kind of behaviors that would indicate psychologically he was intact enough that he could pay attention, he could concentrate, he could evaluate, he could select options, he could pursue options and pursue a goal, which was to elude the police. And those things go along with rational behavior, not with psychotically-driven behavior.

[175] Q. Now, I think we're all in agreement that no one knows what was going through the defendant's head at the time of the murder. Correct?

A. That's correct.

Q. And you have seen Dr. Morenz's report and he agrees with that?

A. Yes.

Q. Now, we also don't know of any stressors, do we?

A. Other than being pulled over by the police.

Q. If that is someone's ultimate goal, is that a stressor?

A. No.

Q. Now, everything we've gone over, I want to kind of give you that litany at the beginning, would you be willing to say that you feel that the illness suffered by the defendant satisfies the first prong of the insanity test?

A. Yeah, I believe it does.

Q. But it's your opinion it does not satisfy the second for reasons you've told us?

A. That's correct.

Q. For someone to opine, say, an expert to opine that the defendant did not know what he did was wrong, would that individual have to imply or infer things that [176] are just not known in this case?

A. I believe so.

THE COURT: Counsel, I'm not sure I understand what you're asking there. Would you ask that again please?

MR. POWELL: Sure, Judge.

THE COURT: Thank you.

MR. POWELL: Let me just go back, try and clean it up a little bit.

THE COURT: It may be clean enough, but I just didn't process it.

MR. POWELL: It's late in the day.

Q. BY MR. POWELL: Knowing what we know now, factually, of the events of June 20th and June 21st of 2000, surrounding the murder of Officer Moritz, is it your opinion that if a mental health expert were to opine that the defendant did not know what he did was wrong when he killed the officer, would that individual be speculating, would that expert be speculating or inferring things that cannot be known?

A. I think that it would be –

MR. MIDDLEBROOK: Objection. Excuse me, Doctor, I have to object as to relevancy of this. I have not gone into Dr. Morenz's report on cross-examination or any of the other doctors, so I'm not sure why we are [177] getting this question.

THE COURT: I think it's appropriate.

Go ahead. You can answer the question.

THE WITNESS: I think that the critical task is to tie the mental illness to the behavior. And, so, to do that, you would have to assume in this case that the schizophrenia, the paranoid delusions were the motivating and necessary and sufficient cause of Eric's behavior.

Q. BY MR. POWELL: And you'd have to infer that that was the cause of the wild-eyed look –

A. Yes.

Q. – that's been reported?

A. That's correct.

Q. And that there was a stressor that we don't know of any of at this point?

A. That's correct.

Q. These would all be inferences that would have to be made?

A. I believe so.

Q. You ruled out drug abuse as a primary cause of the mental problem of the activities. Correct?

A. Correct.

Q. How about as a contributing – a potential contributing factor?

[178] A. It may have been a contributing factor.

Q. And why do you say that?

A. Well, the brain is adversely affected by marijuana and by alcohol. And, so, to the extent that Eric was putting THC and alcohol into his brain, he was compromising even further the functioning that had already been compromised by the schizophrenia.

Q. And that would have been as a result of acute use?

A. Yes.

Q. The defendant only recently talked to anyone about his version of what happened that early morning, correct, to the best of your knowledge?

A. Yes.

Q. Is schizophrenia paranoid type associated with any type of memory loss?

A. Not of global memory loss, no.

Q. During cross-examination there was some discussion on events leading up – and I'm trying to think of the language that was used. It wasn't premeditation but preceding events. And it seems that you had perhaps changed your opinion on some of those – some of those events.

A. Yes.

Q. Could you please explain?

[179] A. I think it was that in the interview I was asked whether he had engaged in planned for behavior. And, at this point, I think I conclude –

THE COURT: Did or did not?

THE WITNESS: He did engage in planned behavior. That may have been as minimal as getting out of the car and pulling the trigger. But I think that he was rationally making a choice to kill the policeman; and, therefore, by definition, he engaged in planned behavior.

Q. BY MR. POWELL: Would you factor in the factor that the defendant fired multiple shots into that equation, also?

A. That would tend to support that.

Q. During your conversations with the defendant, did you bring up the topic of aliens or did the defendant bring up the topic?

A. He brought it up.

Q. Did the defendant tell you anything about the Aaron story that we talked about earlier?

A. No, that wasn't –

Q. But he told you many other items about aliens?

A. Yes.

Q. And his concerns of aliens?

A. Yes.

[180] Q. From your review of the complete file here, when was the first mention that you can recall of aliens by the defendant to anyone?

A. I believe it was, he mentioned it to his mother. And I'd have to say, I don't have an independent recollection of it, but I remember that Mr. Middlebrook put it at April of '99.

Q. And, Doctor, what I'm going to do now, just to kind of put you on notice is, I'm just going to go down my notes of cross-examination, so this may be a little disjointed and I'm just going to go down through things I want to try and clear up.

A. Okay.

Q. Do you feel that you strategized with any of the prosecutors in this case?

A. No, I do not.

Q. Sometimes attorneys, particularly prosecutors, need to be educated on mental health issues of a sophisticated case, don't they?

A. Yes, they do.

Q. And is not part of your job as a professional to educate the prosecutors?

A. Yes, it is.

Q. Or the defense attorneys, if that's who you're working with?

[181] A. That's correct.

Q. Did we have any input, other than providing the information to you, with results to your conclusions contained in your reports?

A. No.

Q. Would it be fair to say we did talk to you about trial preparation to let you know which areas we were going to go into?

A. Yes.

Q. And what your proposed answers would be?

A. Yes.

Q. And we asked you if you had any suggestions to make it clearer for the Court?

[A.] Right.

Q. You said you were – you've never been hired by the defense as an expert regarding sanity. There are times, in fact, you have been hired by the state and you have ended up testifying for the defense or opining against the state's position?

A. Yes. There was actually a case here in Flagstaff where I was asked to render an opinion by you and, in that case, the defense expert concluded that the defendant was sane and I concluded he was insane.

Q. And I have never forgiven you for that, long, long ago. So there are times when you're retained by one [182]

side or by the state and you go in, do you still maintain an objective position?

A. Yes.

Q. What was your purpose of meeting with Dr. Potts?

A. Just – well, there was this complex case with a lot of unusual features to it, and I wanted to get his perspective of some of those features.

Q. Was one of the primary things you talked about the legal definition of insanity in Arizona?

A. We talked about that. I don't remember that as being a primary consideration.

Q. When you were questioned by Mr. Middlebrook at your office a couple months ago, we've gone over one of the statements you said to him about the definition of insanity.

A. Okay.

Q. Do you recall that this morning?

A. Yes, I do.

Q. Earlier in the conversation with him did you also cite as controlling the actual statute, the 13-502?

A. Yes, I did.

Q. So that was – 13-502 was in addition to the gross impairment of reality?

A. Yes.

[183] Q. And was that further explanation of the actual statute itself?

A. I think that it was. I think that it may even have been referring to the fact that in the DSM-IV, that they refer to psychosis as any impairment in reality, which seems to me to be a very broad and unproductive definition, but that's what's in the book.

Q. You were asked on cross-examination if it was, I think, reliable, the defendant's behavior, eight hours before the murder, and I believe you said it was significant.

A. Yes.

Q. Would you agree with that?

A. Yes. I think that the question – one way of asking the question is whether there was any correlation between one's behavior eight hours before and eight hours later. Certainly, my position would be that even though Eric has schizophrenia, that there should be some correlation.

Q. There was some talk about the defendant being assaultive at times, and then the way he was characterized in court today, not remembering what happened, and Brian (sic) Matje was one of those that was brought forward today. Now, you recall that on the day preceding the murder he did have quite a vivid recall on [184] Brian Matje, did he not?

A. Yes.

Q. And that was from approximately a week beforehand?

A. Yes.

Q. So if people would say he looked at them after the assault with a blank look, like he didn't know what happened, that would be a wrong assumption on their part?

A. I believe it was.

Q. Do you think the mechanics of the shooting, as it was asked on cross-examination, are important to your determination here as an expert?

A. Yes, they are.

Q. And why is that?

A. Well, because it's part of the actual fact pattern that's available for drawing a conclusion about what his mental state was at the time.

Q. I believe next we spoke about – or you spoke about the GAF scale or rating, and you gave him a 31. And, again, at what period of time was this reflective of?

A. Up and at the time of the shooting. Let me correct that. When I originally gave him that assignment, I meant to say that the last that we know of him, he was functioning at that level when his parents [185] left the movie theater. And the way that I'm using the GAF scale is to try and provide some gauge of how much of a change would have had to have occurred between the time that he left the movie theater and when he shot Officer Moritz.

Q. So it would be reflective of when his parents left him at the theater?

A. Right.

Q. And we don't have any information about drug or alcohol use. The defense has not provided any. And we have no information about stressors?

A. No. So there's two different theories. One theory could be he went out and he got loaded and his GAF went down to a 25 and he shot Officer Moritz. Another theory could be that, for whatever reasons, the schizophrenia was exacerbated, his paranoia overtook him in a way that it never had, and his GAF pummeled down to a five or a one. We don't know.

Q. Well, that's interesting you say paranoia overtook him as it never had before. What do you mean by that?

A. Well, he – obviously, shooting a police officer is a gross isolation of symptomatic behavior of whatever it's a symptom of, and so he had never demonstrated anything akin to that. In fact – well, he [186] just hasn't.

Q. Okay. So up until then, we have a guy punched in the nose and some people threatened?

A. Right.

Q. And you are – you agree that – let me make sure I get this right, so tell me if I'm correct. The Aspen Hill GAF rating was 30?

A. Yes.

Q. The Title 36 was 31, if you recall?

A. Dr. Everley's?

MR. MIDDLEBROOK: Title 36 was 20.

THE WITNESS: 20, yeah.

Q. BY MR. POWELL: I'm sorry. Have to move down a couple lines. GAF was 20. And then the ASH was 31?

A. Yes.

Q. And Dr. Everley's, the GAF would have been after defendant had been arrested and in custody for over two months?

A. Well, one of the – that's correct. And, of course, Mr. Clark stopped eating and drinking almost immediately upon being taken into custody. And, so, within 24 hours he did have a medical condition impacting his psychiatric status. And, so, his post behavior – his post arrest behavior and its understanding of that was complicated by his hunger strike and his refusal to [187] take fluids.

Q. And that would have been reflective to the Title 36 GAF score?

A. That's correct.

Q. And when at Aspen Hills, there was no such problem such as that, and their ranking was a 30?

A. Correct. I guess I should clarify, too, he wasn't on a hunger strike. He simply stopped eating.

Q. There were certain areas pointed out by counsel regarding the lower levels on the GAF, and one was that the defendant had no jobs or friends. Now, do you agree with that assessment completely?

A. I agree. I certainly gave consideration to those things and I used those examples listed in the GAF as a reference point by you to fix my assessment. And so I

think that, though, you know, he was still functioning among his friends, he was still going out with his friends and he didn't have a job, but I think the fact that he was 17 and he had employment at home is sort of mitigating around that. So I gave those things consideration when I gave him the rating of 31.

Q. Did you take your evaluation seriously?

A. Very.

Q. And would you – would it be fair to say that your evaluation was done before you knew what the other [188] GAF evaluations had been at other times?

A. That's correct.

Q. As you sit here today, after cross-examination and some introspection, do you agree or disagree with your evaluation of 31 GAF?

A. I agree with it.

Q. It's been pointed out that the defendant, when he was arrested for DUI, was not aggressive to the police officer. Now, your understanding of that incident, was he pulled over by that police officer?

A. No, he wasn't.

Q. What is your understanding as to the situation when the officer arrived?

A. Well, that he had wrecked his car and his car was sitting on the side of the road disabled and he had been there for 20 minutes, I guess, when the officer arrived.

Q. Could that account for the comments to the officer, I've been waiting for 20 minutes for you?

A. Yes.

Q. And we've been told that was on Oak Creek somewhat of a busier road than, I would imagine, Gillenwater Street would have been at 4:50 in the morning. Would you think that would account for any other reasons that the defendant may not have been [189] aggressive if he would have chosen to do so?

MR. MIDDLEBROOK: Objection, speculation.

THE COURT: He is allowed to give his opinion on that. Overruled.

THE WITNESS: Could you rephrase that please?

Q. BY MR. POWELL: Do you think there is a factor in the fact – when the DPS officer comes to him by Oak Creek, that's on a busy traveled road, cars going by, daytime, in contrast to the Gillenwater murder was at 4:50 in the morning, we assume not many cars going by, in a quiet neighborhood, would you like to comment now on the things that have been said the defendant was not aggressive towards the DPS officer, yet, he killed the Flagstaff police officer? Would you like to comment on that?

A. That would be a disinhibition against acts of violence. I'm talking inhibition, not disinhibition.

Q. And there – when the defendant was arrested, there actually was a bit of confrontation with the DPS officer, wasn't there?

A. Yes.

Q. Could you explain to the Court what you recall that being?

A. They told him to stop and he didn't and, [190] eventually, the laser was – apparently, he saw a laser on his chest and chose at that point to stop. They told him to raise his hands over his head, which he did, and they told him to get down on his knees, which I believe he did, and they told him to get down on his stomach and he refused and they forced him, and they said to put his hands behind his back and he refused so they had to forcefully do that.

Q. I'm sorry. I may not have been clear. I was addressing the DPS officer at Oak Creek Canyon, if there was some type of physical confrontation there, if you're aware of it.

A. Yes. He apparently tried to crawl out a small window. I never got it straight in my mind if it was a window between the back seat and the driver's seat or at the side of car, but he was crawling out, and then the officer had to restrain him to force him back in and to, I guess, secure him in some way.

Q. And this was after he had been placed under arrest?

A. Yes.

Q. As far as you know, did the defendant ever make any suicide attempts?

A. No gestures, no.

Q. Even a token gesture?

[191] A. No, not that I'm aware of.

Q. And is that an important issue to be factored into GAF scoring?

A. Yes. There is a difference between suicidal ideas and suicidal behavior.

Q. I may be confused here, but I think at one point you had said you didn't think the circling behavior in the neighborhood of University Heights was prefatory conduct. Do you agree with that today?

A. Yes. I think that I wouldn't agree with that. I think that the theory that has the most support in my mind is that he enticed the cop and so he was provoking a police action. As I have said before, the alternative theory is that he was in a paranoid state and so forth. We don't know which of those two is true, but my position is, it's more likely and more probable that he intended to shoot the cop.

Q. And what is that based upon?

A. As I have said before, you know, the day that we have, whether it's the fact that he said – allegedly said that he was going to shoot the cops if he was pulled over again, the fact that he seemed to be doing okay that night, and then – and then the circumstances surrounding his taking evasive action.

Q. Now, you agreed with counsel on a couple of [192] occasions during cross-examination and I'd like to look into this. You agreed that the defendant commonly carried a gun up until this event. And I don't quite recall that. Could you please explain where you get that information?

A. I suppose the only information I have about – well, I have information about weapons, about the pepper spray and special forces knife and so forth at Oak Creek Canyon in April. Then I suppose the next thing is his parents finding him with the gun in May. And that maybe – that is my first recollection of a gun. There was also mention of a machete he kept under his pillow at one point. But the first mention of the gun is in May.

Q. So, as you sit here today, is the time the gun was found by the parents with him in his room, is that the only other time you recall him having possession of a handgun of any sort?

A. Yes.

Q. Do you recall any reports of him carrying a weapon of any sorts, a handgun, up until June 21st?

A. No. I mean, I remember some things, that his parents – his dad used to enjoy target shooting and some things like that. There may have been some mention by the associates, but I don't recall specific identification that he was carrying a gun.

[193] Q. You were asked about motive. If we've gone over this, please tell me. But you were asked about motive, and you said at the time of the defense interview you hadn't give it much thought, but you'd like to amend that.

A. Yes.

Q. Would you like to do that at this time?

A. Yes, I would. I certainly gave a lot of thought to the motives and whether or not it was his behaviors driven by a psychiatric illness or whether it was driven

by something else, and I think I made that statement in the defense interview because I felt like I didn't want to get caught into a discussion about theories because I don't think that that's the level at which this case should be, you know – I wanted to formulate my opinion. I want to formulate my opinion as close to the facts as I can. But, given that I believe that he was rational at that time, he had to have a motive. And so I believe that his motive was either to avoid being – probably to avoid being apprehended at that time.

Q. And is that based partially on the statements made by Desiree Barreras?

A. Yes, partially by those, partially by the ones of Eric. I suppose a second explanation would be he was [194] doing it because he was executing his adolescent bravado in some state of extreme intoxication, of what nature, we don't know.

Q. Going back to the GAF, is there any significance that the defendant was seen at a teen night night club, place up here, the Sunday before the shooting, in light of the fact the shooting was on Wednesday?

A. Yes, there was. I think that that, again, shows that he had some desire to associate with people.

Q. And I believe of the testimony and it was your understanding – and I want to make sure this is what you considered – Mr. Lozano spoke with the defendant on the 20th. And in the report, as I think you stated, he felt he was under the influence of some type of alcohol or drugs, did he not?

A. That's what he stated, yes.

Q. Does schizophrenia paranoid type commonly make someone's voice change?

A. No.

Q. Can schizophrenia somehow mimic – can't think of the word, Judge – the appearance of someone on marijuana?

A. No.

Q. Alcohol?

[195] A. Not really.

Q. The fact that Mr. Lozano spoke to the defendant shortly before he went to the movie and Mr. Hakes, who saw the defendant at the movie, each said he had the appearance of looking high. And I believe, I could be wrong – I believe Mr. Hakes said it was something beyond alcohol. They may have both said that. Does that make you have any thoughts about the defendant's condition at that time?

A. I don't think it sheds very much light on his professional opinion on his mental state.

Q. How is that?

A. Well, they're not professionals, and so what that means when they say that, I have very little idea.

Q. There was some questions asked of you if the defendant would have had the ability to do a complicated task. And I don't know how you define a complicated task. Let me just ask you, what would your opinion be if you would have had the ability to do that in June of 2000?

A. Well, I think that all hinges on how you define complicated task. If it would have been to come up and fix the AV equipment on that day, I don't know, maybe he could have. If it had been to operate a complicated piece of machinery for the first time – [196] maybe that was the same example – but he probably couldn't have. I suppose it would be because there was a generalization between teens and stereo players and stuff like that, he might have been able to figure it out.

Q. In interviewing his mother, she did tell you about the elaborate booby traps or security systems that he arranged both in his home, actually in two rooms in his home, his own bedroom, the computer room and in his car?

A. Correct.

Q. Do you recall those?

A. Yes.

Q. And did she describe those as fairly complex tasks; again, not knowing what our definition of complex is, something that took some –

A. They were fairly elaborate.

Q. Is that how she described it to you?

A. Yes.

Q. And that those tasks, that was right up – basically, up until the day before the murder, as far as you know?

A. Yes, I believe up to that time. For example, he was capable of doing some cleaning around the house. He

didn't do a great job, apparently. He was doing his [197] laundry.

Q. That's right. Okay.

MR. POWELL: Could I have a moment, your Honor?

THE COURT: Certainly.

MR. POWELL: Doctor, I think that's all I have. Thank you.

Thank you, Judge.

THE COURT: Thank you, counsel. Counsel, just before I release the Doctor, do I have a copy of the GAF categories that were being shown on the thing? I think I did, but I don't know what exhibit it was.

MR. POWELL: It's in the Doctor's report, Judge.

THE COURT: The one that I have?

MR. POWELL: Yeah.

THE COURT: Which report?

MR. MIDDLEBROOK: It's in – well, truly, but it's – it should be in about page 50, 50 through 60, he's got the exact scale verbatim.

THE WITNESS: Page 50 and 51.

MR. POWELL: And, Judge, we could run you a copy of the DSM.

MR. MIDDLEBROOK: Or we can simply give you the scale that I've been using, Judge, just to make it [198] easier to reference you by.

THE COURT: If it's in here, I just want to make sure I have it. 50 and 51?

THE WITNESS: Yes.

MR. POWELL: At least on one copy.

MR. MIDDLEBROOK: On one of them.

THE COURT: Yes, it is. I will mark it here.

Doctor, I have a question before you step down. There's been quite a bit of testimony from both of the experts about this condition of schizophrenia. And I do a lot of the Title 36 work here in the county and I want to make sure that I'm not sort of blending things a little bit. I recall a doctor/psychologist/psychiatrist telling me one time that with some mental illnesses there is a progression, and that once they have – they go off their meds, it sometimes gets harder to bring them back to a baseline that they were on before they were – before they were off their meds. And I'm wondering, is this one of those diseases?

THE WITNESS: Yes.

THE COURT: In that vein, you mentioned stressors and you also mentioned that it was – this disease was progressive.

THE WITNESS: To an extent, yes.

[199] THE COURT: But that stressors can aggravate it.

THE WITNESS: Yes.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: Okay. I'm being asked to take a look at a lot of things that have happened since his arrest and try to ascertain his mental state at the time of the shooting.

THE WITNESS: Right.

THE COURT: And I'd like to hear your comments or just if you would discuss with me what you feel the stress of the shooting, running from the police, hiding from the police, the arrest, the incarceration, to what extent does that affect how he is today or how he then subsequently became? I'm trying to get a handle on that. If there's no relation, fine; if there is some relation, I'd like you to talk about that.

THE WITNESS: Uh-huh. Well, certainly, you couldn't give him much more of a stressor than to have him in a courtroom with a murder charge. Let me begin by saying that what progressive means in my mind is that the disorder would develop up to a point and then the person would typically plateau at that point. It's not progressive in the sense that cancer is progressive [200] and it will just keep getting worse. It's, rather, they hit a particular level of functioning. In fact, one way of understanding that is that the GAF is sometimes used to say they were at this level of function premorbid, therefore, we expect them to get back to that level premorbid, but that does not apply to onset of schizophrenia. So it's more like if he was at a level on GAF when he was taking medications, then he stopped taking medications and dropped back down, the hope would be we could get him back to the level he was when he took the medication.

In terms of how Eric would be doing if this hadn't happened, you know, we don't know. We know that he said for one of the first times shortly before the shooting to a friend, I have a problem with my mind, so maybe he was getting close to accepting some help. He could have gone through a long period of accepting help, rejecting, accepting, rejecting, go on and off medications, that's a fairly common thing for these kinds of problems. So I'm afraid it's really hard to take those apart. I don't have much clarity about that.

THE COURT: Is his present condition, is that – the condition that he was found when he went to the state hospital on incompetency and all that, could that have been affected by the stressors of the shooting [201] and the arrest?

THE WITNESS: It could have been one way of looking at it. When he was arrested and when he was viewed on the videotapes in the interrogation room, he was at a higher level of functioning at that time than he was at Madison Street Jail when he's defecating in public and masturbating in public. So if he didn't have to go through four hospitalizations for food deprivation and starvation and all of those stressors on his body, would he have ended up at that same level? I don't think so. He probably – I think his family probably would have been able to keep him at a higher level of functioning. They probably would have gotten the courts involved. The courts probably would have had him institutionalized against his wishes because he was a danger to himself. And, hopefully, some higher level of functioning could have been preserved.

THE COURT: Okay. Thank you very much, Doctor. Appreciate your comments.

THE WITNESS: Thanks.

THE COURT: Counsel, do we have any other witnesses that either side is going to be calling?

MR. MIDDLEBROOK: No, your Honor, based on – I should say, based on the fact that we've reached the agreements that Jason Tackett won't testify based on

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF COCONINO

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| STATE OF ARIZONA,<br>Plaintiff,<br>vs.<br>ERIC MICHAEL CLARK,<br>Defendant. | ) | Case No. CR 2000-538 |

REPORTER'S TRANSCRIPT OF
BENCH TRIAL PROCEEDINGS
DAY 11

August 27, 2003
9:00 o'clock a.m.
Flagstaff, Arizona

BEFORE: HONORABLE H. JEFFREY COKER
Judge of the Superior Court

PREPARED FOR: THE DEFENDANT (Certified Copy)

* * *

[6] On that note, Mr. Middlebrook, you may begin your presentation on closing.

[7] MR. MIDDLEBROOK: Thank you, Judge.

You've heard a lot of evidence, and the question's going to be, did this person shoot Officer Moritz or did something intervene that was so prevalent and so disturbing that it caused a person to suffer a gross impairment of reality. That's really the question.

We know that most mental health professionals use the gross impairment of reality as a standard, and we also

know that 13-502 really doesn't tell us not to use that. It says, you look at the severity to determine whether a defendant would know what they were doing was wrong. Well, obviously, if that's the case, they had to have suffered a gross impairment of reality, and that simple definition is the one that is most reflective of what happened with Eric.

This particular picture I just showed you many, many, many people have testified would have never have been involved in this. When we talk about schizophrenia as it relates to Eric, we've had two doctors who have come in and testified as to their expertise in the diagnosis of schizophrenics. We know that – I know that as you review those reports, a question that you have to ask yourself is, what is the objectivity of the doctor rendering the opinion? Is it a doctor that has been used by both sides, the state and [8] the defense when he has rendered an opinion, or is it a doctor that has only been used by one side? Is it a doctor that has educated medical students as to the ethics of forensics evaluations or is it a doctor that strategizes with the state in setting up an opinion and then eventually rendering one?

MR. POWELL: Objection, misstatement of the evidence, your Honor. That was denied.

THE COURT: Counsel, I will take it for what it's worth. It's closing.

MR. MIDDLEBROOK: We know that Dr. Moran has, prior to writing his report, consulted with Jack Potts, who is a consultant for the state. We know that prior to the opinions ever being rendered by Moran, that he had created a document setting out the strategy, not that he created it but his assistant did, and he relied on it. So it's not surprising, Judge, when one doctor talks to us about

there being considerable evidence that Eric suffered a psychosis so prevalent, so continuous, so chronic that he could not understand or could appreciate what he was doing was wrong. That doctor has told us to even a reasonable degree of medical certainty that Eric was grossly impaired. That's what he's telling us.

Another time when you're reading these reports you have to recognize, what is the doctor relying [9] on? Is the doctor relying on reliable evidence or has the doctor been misinformed or not told the complete truth as to what was really occurring, not only at the time of the shooting, the day of the shooting, but before that? And we know doctor – and we know, Judge, because we spent yesterday with Dr. Moran, really Dr. Moran, on some really good evidence, had half a picture and, yet, we know Dr. Moran still, nevertheless, rendered an opinion that Eric's schizophrenia – that Eric is schizophrenic, is schizophrenic, that he's paranoid, that he was psychotic at the time of the shooting, and that his highest level of functioning was still very, very low, at a 31, and that's Dr. Moran's analysis. And, yet, we know that Dr. Moran did not consider Carden Hakes's testimony as to what Eric looked like at Harkin's Theater. We know he did not consider Nicole Benally's statements that she had not dated Eric several weeks before, in which he said was significant in finding what severity of symptoms he believed Eric was suffering. In fact, she had dated him over a year before and at that time was very suicidal, talking about slitting his throat with a knife.

We also know that Dr. Moran relied on Desiree Barreras but did not consider that Miss Barreras, when you read her account, was told by someone else what [10] Eric said, and had not considered that Desiree said this fricking guy doesn't have the guts to shoot a cop.

Dr. Morenz has told you that he believed that on the day of the shooting, if we're talking about the GAF score, that Eric would have been lower and should have been lowered. And I think, fairly, Dr. Moran has to consider that his level of function was a lot lower. He had not considered any of the evidence. And I noticed on redirect Mr. Powell never asked him to reconsider, in light of the evidence that came out on cross-examination, as to whether that would change his opinion.

Now, I'll be straight with you. It wouldn't have changed his opinion because he was brought in by the state to render only one opinion.

Judge, when we talk one of the questions, and I know that will be argued by the state was, you know, did Eric set up this ice cold ambush or was it simply a coincidence that Eric had made statements at Thorpe Park ranting and raving about killing police officers or was there an ice cold plan as the state has characterized in their opening statement. You've had a lot of evidence presented about Eric's cognitive abilities, and we know that schizophrenics have impaired cognitive abilities, but let me show you a picture, several pictures, I believe, that will demonstrate quite [11] clearly what Eric's cognitive abilities were. I might just be able to – Judge, these pictures were taken on the day of the shooting. This is Eric's room. And we know that in the 10th grade Eric went from testing above grade level, cognitively, to about the 4th or 5th grade level. Is this more reflective of that, that he is still functioning at that level, 4th or 5th grade?

And just another quick picture, these are photos in his room. And as you go through the defense notebook, you're going to see the Disney mermaid photo, the Austin Powers

photo, Poke'mon, are these more reflective of a grade school mentality? These are what Eric put around his room when no one was looking, when no one had any reason to doubt that Eric was trying to set up a plan or anything like that. That's Eric's ability to plan. That's it.

So we know that we're talking about 4th and 5th grade level. And that's what Dr. Moran considers as on a high day right before the shooting, on a good day for Eric.

We also have to look at some other elements of schizophrenia and what the sufferers go through. We know that their appearance completely changes. And if there's any doubt of that, this is a photo taken roughly six months after the shooting. But [12] we know that Eric went from this bright, clear-eyed student to this, for one reason, because schizophrenia had spread its spider webs into his mind so deeply and so grossly that it completely changed who Eric was. And how many witnesses have told us, have told us repeatedly, that was not Eric, that's not my son, that's not my brother?

In our system of justice, we punish people who do things that are wrong, who have malice, who have an ice cold heart. Yet, here, we have Lois Wells through Victor Meza through the other witnesses tell us, Eric was a warm and loving child, a warm and loving friend, a kid that would bring in other people into the group before he changed.

A question you have to ask yourself as you review all this evidence is, where is the evidence of Eric's ice cold heart? Judge, we know that paranoid schizophrenics in particular suffer from persecutory delusions, they're out to get me. These are classic symptoms. And when we're talking generically with both Dr. Morenz and Dr. Moran

about the delusions that schizophrenics suffer, here we know that Eric's, the depth of his delusions were, when he woke up in the morning he was breathing poisoned air, the food he ate was potentially poisoned, the water he drank was [13] poisoned, he had to have packaged foods, go places where aliens had to feed everybody so that he could not be poisoned, the clothes he wore was poisoned.

When Eric was attending a party, senior ditch day, we know he at that time was so paranoid – he was going to go with friends. He was going to be with friends – by the way, by then he almost had none – but he was going to socialize, as were going to hear from the state, that he was socializing. Well, what was he doing? He was socializing. Let's see, he was laying in a creek, completely gone, everybody's told us that about senior ditch day. And, yet, the only reliable evidence the state's presented and I presented was Mr. Carrillo who said, Eric didn't smoke marijuana that day, and then there's other witnesses who say he may have but we didn't see him. And the only thing we know is he drank a 40-ounce thing of beer. That's it. That's all anyone ever saw him drink. And when he's later arrested and his car is searched, there's two cans of 40-ounce beers in the car, one of Mr. Carrillo, one of Eric. But let's look at what else is found. What else was found was an armed pepper spray canister, an Army Swiss knife, and a club, a flashlight-type club, and that's Eric preparing to go to a party. Does that give you any idea as to the level of paranoia and how continuous and prevalent it was [14] in his mind?

You can measure, I believe, Judge, fairly that when you're considering what is a persecutory delusion and how did it affect Eric, how did the mental disease affect Eric's ability to understand what was going on around him. We

know that he wanted to attend college. He wanted to play football. He had apparently all the abilities to do so and, yet, his mother – he told his mother that he quit playing football, he didn't want to play football, and later we learned why. He felt like his bones were cracking and he felt like the aliens were poisoning him because he decided to quit playing football. Does that give you an idea of how distorted Eric was? And that was in the fall of 1999.

We know that Eric's disease was continuously intensifying. Dr. Moran told us that yesterday and you'll read that in his report, it was continuously intensifying. We know that schizophrenics, first of all, paranoid type, are much more likely to be involved in violent incidents. They're much more likely to commit suicide. They're much more likely to commit a homicide. We also know, and Dr. Moran agrees, Dr. Morenz completely agrees, trying to predict a schizophrenic, whether they're going to commit an act of violence, it's unpredictable. You cannot look at an appearance eight [15] hours before and assume and look at and say, oh, this person was functioning just fine and they have – he would never commit this violent act. We know it's unpredictable. You can't do it that way. So the process by which Dr. Moran has concluded that is flawed by his own testimony. It's flawed.

And why do they kill, Judge? Why do they do that? Because the voices don't leave them alone. It's a relentless pressure. Can you imagine – excuse me – let me ask it this way: Imagine if you will that you take in a breath and knowing or believing you're getting poisoned; that the food you eat at home with the people you love is getting poisoned; the clothes, the very clothes you're wearing is getting poisoned. I mean, what do you do if it's never going away?

We know from Dave Clark, he said it was all about Eric's paranoia. It never quit. It never subsided.

Let's talk about the things that were occurring that we were observing. In school Eric was playing with a pen. We now know he believed it to be a laser that only aliens could see. He believed the reason he was put in jail – we were asking Dr. Moran late yesterday in the afternoon about whether being arrested for first degree homicide would be a stressor. Eric [16] thought he was being put in jail because the aliens hated him. He thought that Flagstaff was full of aliens. This is what he told Dr. Moran. He also believed his brother, his sister, his father and his mother were aliens. Aliens, Judge.

Our families are important. And, certainly, I think both sides of the aisles here agree, that's why they're here, because family is so important to us as a society and as what makes up our life. And, yet, here is this kid, 17 years old, trying to deal with everything else in school that 17-year-olds deal with, and he's trying to deal at the same time with the belief, a honest to God belief, that his mother is an alien and she's keeping it a secret from him. And we know that the – Eric's logic, the reason aliens are here, is to trade sugar and broccoli.

Again, is that reflective of cognitive ability? Think about all the witnesses that testified and told us about the bird in the car. Most of them thought it was pretty bizarre. He kept it in the trunk when he was in school. On senior ditch day, it's flying around the car. The police officer arrests him, there's a bird in the car. And, yet, he believes this bird, which is basically his best friend and only friend, has a robotic lung and its – the aliens are so sophisticated,

[17] they replaced this bird's lung so that Eric won't know that they are still poisoning his air.

Judge, I don't think that there's any doubt that's evidence of Eric's break with reality. There is no question here that his reality was grossly impaired.

You know, the problem in this case, Judge, was there was so much initial push to believe that Eric was simply a drug-crazed teenager. The police investigated this case, they repeatedly made statements to witnesses and through their investigation, in fact – I can't remember the officers that testified towards the end of the state's case – basically said, yes, I interviewed 50 people and most of them never saw Eric use any other drugs than alcohol and marijuana. And when I asked Dr. Moran, you know, look at the voluminous records, did these officers – did they even attempt to try to find out if Eric really was mentally ill like Terry and Dave had told Detective Gillette almost at the very moment that the police are coming into their door? No, they didn't. They didn't. They did little or no investigation into that.

And so the problem is, is that you kind of have this initial push of, God, he had to have been intoxicated or on drugs. But the reality is, three years [18] later, we know he was unadulterated, so full of schizophrenia, his mind was so taken and so gone that he was dressed in double layers of clothing, he was stringing strings in his car and in his room to protect himself against them. He was so frightened, he was telling his mother he was going to commit suicide.

Judge, I'd like to put in context for you what Dr. Moran's testimony was about his global assessment of functioning. We know now that other mental health

professionals have done the same thing with Eric. All right. 1999, summer, Aspen Hill admits Eric. They GAF him at 30. And Eric's committed for three days. And we know at that time, 30, Eric's rolling around on the ground in front of a police officer, his moods ranging from laughing to crying to napping, he's going to nap, he's going to go to sleep on the ground in front of the police officer. We know that he suddenly spins on his father, F-U, and his father sees that look in his eye change and his father knows something's not right. Eric is not there. Eric is gone. Wherever Eric is, he's not there at that moment. And Eric's committed, committed for three days, not Title 36, committed for three days.

Okay. A year later – excuse me – a year and several months later, August, 2000, Eric's been sitting in jail. We obviously know he hasn't been on any [19] drugs. From the moment he's placed in jail his – I mean, it's so funny, because if you look at the slope here, we can see from about senior ditch day on, Eric's sliding. Here's what happened, he's arrested, his symptoms continue, it's a smooth slope, it continues and continues and continues and continues until when? Medical intervention. Someone finally hits him with Haldol and it slows him up. The slide stops.

But let's talk about the Title 36 that occurred in August. We know that Dr. Shelley Everley GAF'd him at 20. We know at 20 Eric was sitting in his cell yelling, screaming about the aliens. The detention officers were aliens. This is all part of an experiment. Most white people are aliens. He was telling them – at about exactly the same time his parents Aaron's story. Flagstaff's full of aliens. Only bullets can stop aliens. He's GAF'd at 20. And what happens? Judge Newton renders a verdict, after

listening to all of the evidence by many of the health professionals, that he's a danger to himself and others. He's Title 36 and he's involuntarily committed for treatment. For treatment, Judge, and the treatment begins. That's September, 2000.

April, 2001, Eric is sent to the Arizona State Hospital, a facility well known by this Court because their whole job is to look at people and their [20] mental state. And what do they GAF Eric at coming in on admission? 31, the same as Dr. Moran. 31, Judge. You had just previously ruled that Eric was incompetent to stand trial. He didn't even understand at 31 that he had to assist in his defense, that he knew who the judges were or anything else. That's the context of the GAF score. And that was Eric's highest level of functioning given by Mr. Moran just before the shooting. He was incompetent.

Is that a gross impairment with reality? Was Eric's behaviors considerably influenced by delusions? He had no job, Judge. I mean, when we were looking at the criteria, no job, no friends, his mother was seeking commitment several days and the day before the shooting, he was acting grossly inappropriate, he was carrying weapons. Remember he went from pepper sprays and knives to guns, Judge, that's the level of escalation. And he had these guns with him all the time, by the way. I know the state wants to act like he had to go get them and everything. He had it at the park. You can't have it both ways. You know, he had it at the party. We know he had it in his room. He carried it in a backpack. When you look at the state's evidence, there's another gun in the backpack. Is that – does that – is that a measure of the fear that Eric was [21] suffering?

We know that his hygiene was poor. And probably the most prevalent statement made was by Adam Lozano the day – the evening before the shooting, after Terry had spent most of the day trying to get mental health help for Eric, Eric says, I've got mental problems, and he's almost incoherent when he says it.

And since then, Eric has denied any type of mental health issue. He basically is resistant to medication. Before that, he refused to see counselors. Even Dr. Moran says, I agree, Eric should have probably been Title 36. Dr. Morenz says, it's very unfortunate he wasn't hospitalized before this.

And I'm sure that there are many things that the Clarks wish they would have done differently. And I'm certain the State of Arizona wishes it would have done something differently when they were asked to intervene and try to help us get mental help. But it's interesting to note that the burden of proof in a Title 36 proceeding is the same as is on the defendant right now. And there has not been a single expert, not a single witness who has testified that Eric was lucid and should not have been committed immediately before the shooting.

Let's look at the testing that was done by [22] Dr. Moran. These are tests that give a valid profile of someone who is quite disturbed psychologically, quite gullible, overtly paranoid, has extremely bizarre thoughts and believes in special mystical powers. He's going to be viewed by inmates as crazy. And this is when he's on Haldol. Judge, this law, our law punishes malice. We treat sickness.

I don't know if it's going to be argued by the state, but I have to bring this up, Judge. Eric has never said that the

aliens made me do that, made me do this. That's right. That doesn't mean, as Dr. Morenz has told us, that he wasn't insane. I mean, let's look at what was occurring. Was the aliens his best friends? No. They were his enemy. Alien – he was doing everything he could to avoid the aliens, to protect himself against the aliens. Of course, he wasn't operating under a command hallucination. He was operating in a total pit of paranoia.

Let's talk about prefatory behavior. One of the things that many mental health counselors look at or many health professionals look at, was there any prefatory acts. Also, Dr. Moran, in the interview 30 days before the trial tells me, no, there were no prefatory acts and, yet – and then I ask him, you know, did you make that statement? Were you truthful to me? [23] Yes. But now I have changed my mind. Now, I might add, he changed his mind in trial. In trial he changed his mind. Is that a strategist or is that an objective opinion? Well, I think it's more of a strategy because he was obviously, as he testified and testified and testified, it became quite apparent that whatever the state needed, he was going to give. And that's really how you have to look at his opinion. That doesn't mean he didn't lay a great history. No, he laid out an excellent history; unfortunately, he missed a lot of big issues. Not his fault. He wasn't given the information.

How do you look at this? How do you look at what happened in this case? Eric is certainly – and, certainly, loud music is booming. It's so loud, Judge, people hear the music with their windows closed, and for blocks.

Dr. Morenz, Dr. Moran testified, many schizophrenics use volume to turn out the voices, to drown them out. We know that Eric was listening to TV at night mostly,

**volume full blast. Judge, it's pretty, pretty apparent, Eric was doing just that, especially when you looked at this overall. And when you stand on a mountain and you overlook this town, you start realizing the connections between, for example, where the jail sits, where you sit, his house sits, where the courthouse [24] sits, and when you look, because that's why you're on the elevated bench, you look down on this problem that's been presented to you and you start seeing all of the connections that are being – that are occurring and look at the connections that are there, I mean, there has been no witness, no witness that has come in and said Eric ever had a clear thought from about the fall of 1999.**

And the state will argue, yeah, but, Judge, he still knew what was wrong because, look, he ran from the scene. Well, wait a second. He ran from the scene, and I don't think there is any dispute the police officer was shooting at Eric, so whether Eric was completely delusional at that point or of completely clear mind, that's not unreasonable for anyone under those circumstances to run.

But why would Eric run? Isn't it also reflective of his continued belief the aliens were out to get him? And did he run in a panic like someone being shot at? No. It's kind of a slow trot, like, huh? I mean, he's not even there, Judge. He doesn't even have survival instincts. Someone's shooting a large caliber gun at you, the brain goes into hyper mode and you're ducking, you're diving for cover, you're doing all kinds of things to save yourself, and Eric is slowly trotting away.

[25] Was there motive? Well, Dr. Moran told me that he didn't give any motive any consideration until he got to Desiree Barreras's statement, and he said that's about it. He never talked to us about the Thorpe Park. He never talked to me about Thorpe Park. You got to remember, he knew that I was there to interview him and find out all his nuances and, yet, he's telling – flip-flopping all over the place in trial yesterday.

But let's talk about the Desiree Barreras statements. We know that – and when you read that, when you look at the transcript, not the police report – that's the problem Dr. Moran had, he kept relying on the police reports that are completely inaccurate – we know that Desiree Barreras and Anthony Nelson, I believe it was, or Anthony somebody, Hernandez perhaps, said Eric said blah-blah-blah-blah-blah, and then we start – they start talking to her about Eric, and, well, you know, he's bisexual, he's gay. And, by the way, all these statements about F the police, kill the police, she is completely obsessed with Clinton Ezell when she's talking about that. She's talking about Clinton being the guy that actually shot – when we heard this, we thought Clinton did it, because that freaking little fag, Eric, I pushed him and he doesn't have the guts to do it. But that was not considered by Dr. Moran.

[26] Judge, the Thorpe Park incident is only reflective of Eric's delusional state. It is not reflective of a plan. The people that testified to what they actually saw and heard Eric do have all testified, Eric wasn't there. Eric wasn't there when he was making those statements. He was gone. He was under the influence. They don't know. You know the problem with lay people is that we know that most of the lay people, perhaps at the urging of the police when they were being investigated – when this matter was

being investigated, oh, yeah, he was crazy, he was on drugs, he was on acid, he was on coke, he was on meth, he was on ecstasy, he was on steroids, he was on everything, I don't think we missed any drugs, maybe heroin. I didn't hear heroin. But I don't think we missed a single drug out there. But that's not what it was.

Dr. Moran, Dr. Morenz ruled out intoxication. We know Dr. Potts, the state's consultant, in consulting with Moran ruled out LSD intoxication. Moran ruled out the intoxication element. And was Eric intoxicated? There's almost little or no evidence that Eric was intoxicated. Yes, they have a urine test taken 30 hours later from the shooting, and – but we know that that has up to, I believe, 25 or 30-day shelf life or half life, as they call it, in the system. We know that [27] marijuana has a smell, a distinct smell. It's stinky and it stays around. And we know not a single police officer that was on the crime scene mentioned any words that the truck smelled like marijuana.

So what gave Eric the wild eyes that Susan Rinck, Mike Greenway, very reliable witnesses, as they saw this driver going around and around and around, what was it, Judge? You know what it was. There was nothing else there. Eric wasn't there. He wasn't there, not mentally. How do we know that? Look at what happens when he gets taken to the police station. He's arrested under the belief, because no one told him – he was arrested for DUI drugs at that time. I come in and tell him, you know, they think you killed the police officer. Bryon, I don't need you here. I don't need you here. And so I leave. We leave the room. And he starts mumbling, singing to himself, why do you have a problem with me? I mean, poison me? What the

fuck does that do? Take me away. I want to go away. Clearly disturbing behavior.

We also saw this in testimony where Eric, Jason Tackett told us. Would ramble to himself like a homeless man walking down the street.

In the jail the detention officers heard Eric talking to himself about everybody needed to be [28] saved from the aliens. Should it be argued only this poisoning thing – only Eric was responding to this poisoning thing? Wait a second. Wasn't he doing things to try and protect himself? Wasn't he getting pepper spray? Wasn't he stringing his car, his room, washing his clothes, all under the belief that he was being poisoned?

Judge, if we're going to have to use circumstantial evidence to figure out what was going on with Eric and what was Eric's likely reaction at the time of the shooting, we have to look at what happened just several days before at the party. We know that Eric goes to this party with this guy that he barely knows and Aaron Fitzhugh says he kind of thought it was odd that Eric was even there. Then, as they are smoking marijuana, Eric locks the owner of the house out of the house and is smoking marijuana inside. Then, Lauren Beach sees Eric sitting on a chair saying to people, why are you looking at me? Why are you talking to me? We know that simply because Eric – or excuse me – because Brandon Matje says Eric changed. Eric did change. In five seconds or less he was on Brandon, punching him, smashing his nose, breaking it. And to have a second later when Aaron Fitzhugh pulls him off, his eyes are gone, he's staring right through him, he appears [29] confused, he runs off and pulls apparently a gun out of his sock and then runs away. I'm sorry. Says, don't call the

cops, and runs away. That blank look has been testified to by many people; Victor Meza, Dave Clark, Terry Clark, Aaron Fitzhugh, someone who barely knew Eric, and, again, by Susan Rinck and Mike Greenway, Eric, the look in his eye, you can tell what a man thinks by the look in his eye.

No one disputes that Eric was psychotic on the day of the shooting. No one. No one disputes he was delusional. And yet, Judge, when you're making this determination as to what should occur here and you look at Eric, when you look at his eyes, it's a real simple question, was there ever a window of lucidity, ever, in the evidence you have to consider? Or was schizophrenia, delusions, psychosis, so severe that the curtain of insanity was closed?

Judge, the look in Eric's eyes tells us, there is only one verdict, and it's an unfortunate one, he was guilty but insane because there's no other way to analyze the evidence. Thank you.

THE COURT: Thank you, Mr. Middlebrook. Mr. Powell.

MR. POWELL: Just a minute. This is going to take me just a couple minutes to set up.

[30] THE COURT: Certainly.

MR. POWELL: Judge, I'm going to be placing something on the overhead but I'd like to give you a copy. It might be a little clearer.

THE COURT: Certainly. Thank you.

MR. POWELL: Judge, good morning.

THE COURT: Good morning.

MR. POWELL: What I normally do in closing arguments, Judge, is, of course, begin talking about the facts, but I'd like to start with the law today, for obvious reasons, because we're in a position today that's not rare but not all that common either. We're looking at an affirmative defense which we're going to implore the Court to remember with a burden of clear and convincing on the defendant. And so I want to talk to you a little bit about the law if we could to begin with.

Judge, A.R.S. 13-502 is a law in Arizona, in spite of what the defense challenges, however they want to phrase it, there is no other law in Arizona than right here, it's 13-502. And insanity is an affirmative defense, must be affirmatively proved by the defendant and the defendant alone. The defendant cannot rely on state's failure to disprove the defense. And, Judge, you are well aware that the legislature changed the law because it decided that it was too difficult to make the [31] state prove a negative, that a person was sane, as opposed to having the defendant prove that he was insane. So the burden is not on us in any manner whatsoever and that cannot be argued nor should it be a consideration. The burden is by clear and convincing evidence, and this standard of proof is specifically beyond the burden required for proof of other affirmative defenses.

Judge, if you look at 13-205, that is the affirmative defense statute. It provides, unless otherwise specified in the statute itself, that preponderance of the evidence is a standard in affirmative defense.

If you look at 13-502, the insanity statute, it specifically raises the burden of defense. And that was done by

the legislature consciously, Judge, so it is a higher burden and that's something we will talk about later.

The clear and convincing standard is reserved for cases where substantial interests at stake require an extra measure of confidence by the fact finders in the correctness of their judgment, though not to such a degree as required to convict of a crime.

Moving on still with the 13-502, insanity is a two-prong test, Judge. The defendant – first prong is that the defendant is afflicted with mental disease or [32] defect. Second prong, it has to be of such severity that the defendant did not know the criminal act was wrong. Mental disease or defect alone satisfies only the first prong and, as a matter of law, is insufficient to satisfy the insanity defense. Prong two requires an affirmative causal connection – this is going to be a key, Judge – affirmative causal connection between the criminal activity and the mental disease or defect.

Now, put another way as said by Dr. Moran, but for the mental disease or defect there would have been no criminal activity. And, again, this causal connection must be affirmatively proved by the defendant with its own evidence that it has to be clear and convincing.

Judge, this is the law in the State of Arizona. It cannot be challenged. Dr. Moran and Dr. Morenz agreed specifically that they agreed that that was the law. But this morning, Judge, the defense, again, has argued at infinitum one prong, prong one, and has said nothing about prong two, which is just as important. It's required, just like the prong one.

Judge, in all honesty, with all due respect, what I think is that the defense is just trying to wear you down, just like they would a jury; they're going to hear how bad the sickness was, they're going to [33] hear how bad the sickness was, and pretty soon you're going to think he must have been so sick this happened.

That's not the law in Arizona. That is but one part of the law. Then has to be the nexus, which there is none here, showing that it affected the defendant to the degree that he had no knowledge that it was wrong. And there has to be affirmative evidence, no supposition, no guessing, nothing like that. There has to be affirmative evidence. And we are going to talk about that in a bit.

They're trying to get you, Judge, to use emotion. And I should point out when counsel today in his opening close said something about punishing people who were sick, now that's not right. We're punishing people that killed – we're going to punish a person that killed a police officer and knew what he was doing, he knew it was wrong. If he's sick, so be it. He knew what he did was wrong.

The bone of contention, Judge, is not number one, not prong one. The defense has spent well over a week proving the issue which was not challenged by the state. We have not challenged prong one. The state all but stipulated that the defendant was afflicted with schizophrenia paranoid type. As a matter of fact, the state presented Dr. Moran, who actually made a more [34] complete and compelling case with the diagnosis of schizophrenia paranoid type than did Dr. Morenz because of his additional testing and efforts. This is somewhat interesting in that the defense now is picking and choosing with Dr. Moran's reports, and when something is good, they say, of course this is right,

when something is harmful to them, they're going to distance themselves and say he's aligned with the state, even though he comes in and makes a much more compelling case for the defense on prong one. Judge, we don't challenge prong one.

I'm going to leave that now. We do take issue with some of the information provided by the defendant's family, and that's something we are going to talk about in a bit. We'll come back to that area.

What has been proved over the past few weeks, Judge? That the defendant changed? He became reclusive. His hygiene suffered. He became more paranoid. And he may very well have suffered from delusions regarding aliens. And we've heard from friends and family in great detail, time after time, telling us the same types of things.

Now, what I'd like to do is, I jotted down some notes, I have an outline, but I jotted down some notes during counsel's opening close, and I think this is a better time to kind of confront some of this, Judge. [35] The defense argues that the defendant was feeling he was being poisoned; the air, his clothes were being poisoned, his parents were aliens, the pen, the laser, the bird, that he did not attack Officer Hoyt when he was arrested, Oak Creek, all of these things, Judge. But did you once hear any causal connection to the murder of Jeff Moritz or is it just pound on prong one again? That's all you've heard.

What we're going to ask you to start looking at is prong two very heavily today. We're asking you to speculate an awful lot, your Honor. Now, we've heard of these changes with the defendant, but we also heard of defendant's rapidly and increasing use of alcohol and marijuana, at a minimum. We heard daily use of marijuana

from witnesses. We heard a witness say he smoked marijuana with him over 200 times. We've heard numerous people say multiple times during the day, sometimes before school, sometimes before a game, I think one witness even said before a Pop Warner game when he was playing with him. And then we heard from Dr. Morenz, every night at the school by his home.

Judge, you could just as easily when you look at this photograph that defense has been showing you, you could just as easily see a joint in that mouth, you could see a bottle of something in that hand and you [36] could see a gun in the other hand, Judge, just as well. That's what the evidence has proven to you. We know the alcohol was generally on weekends and it was to excess. I will ask you to remember back to Hillary Engelke, who told the story of when they left the banquet the sophomore year and went to another girl's house, they told him not to drink and he continued leaving the house and coming back with a quart, I think it was, or something, a liter of some kind of soft drink he was filling up with alcohol. He became so drunk that he had to – basically passed out and had to stay the night.

Well, what's the issue with that, Judge? Because as we have heard, the doctors have said, no, that's not the cause of the murder. But we have many, many witnesses describing the appearance of the defendant being under the influence of drugs or alcohol. We have witnesses saying he smelled of alcohol and he smelled of marijuana. I'm not going to go through these in any great length. The senior ditch day, we've heard enough about that. Numerous witnesses, Judge. Is that schizophrenia or is that drug abuse? Lying down in a creek, stumbling on the way down, having an accident later on, being able to converse with a

police officer, criticizing the police officer for being 20 minutes late after you've wrecked your car, is that schizophrenia? Is [37] that an episodic section of that? Or is that someone that's drunk or stoned? And as not mentioned today, 42 tabs of LSD in his possession. We have Thorpe Park. And now he tries to minimize this, but he was told at the time each of the people that testified today said he was on something. They weren't sure what it was but he was on something, and one says he did have a beer with him. Teen night, Judge, smell, again, the appearance. The Fitzhugh party, first thing he says when he comes in, who wants to get high? Nancy Edmondson, bad acid trip. She wouldn't admit it but she was impeached by the officer that took the statements from her, he had a bad acid trip and he snapped and then he came back. Just the type of things that the defense now is saying is necessarily and absolutely a result of schizophrenia, when there are other alternatives even though he was suffering from the disease, Judge. And there are many more episodes, the Court will recall, and I'm not going to go any further.

But a special concern is June 20th of 2000. Adam Lozano, the defense has been saying that during the telephone conversation he could not be understood it was so bad. But also remember what Adam Lozano told you, he was under the influence of something beyond alcohol. That was his opinion at the time.

We also have Mr. Hakes, who saw him later [38] on at the theater, and he said, he was intoxicated and it looked like he was on something else.

Okay. Why is this important? Well, what did Dr. Moran tell us yesterday? And this was uncontested, no challenging to this. Dr. Moran yesterday explained very

specifically, and it was not challenged, again, paranoid schizophrenia does not mimic the appearance of marijuana or alcohol intoxication.

So when people say, Judge, that he was drunk or he was stoned, the chances are, he was drunk or he was stoned. Dr. Moran told us specifically, Dr. Morenz didn't contest it, Dr. Moran wasn't challenged with it, it does not mimic – schizophrenia does not mimic the appearance – I couldn't think of the word appearance yesterday – does not mimic the appearance of intoxication by either of these. What's the significance of this? The doctors, again, have said, this is not the cause but voluntary ingestion of alcohol or drugs – this is confronted in both sections 13-502 and 13-503, 502 being insanity, and in there specifically, Judge, it says, if the mental disease or defect is the result of the involuntary ingestion of alcohol or drugs, it's not a defense. That's something that needs to be considered. In 503, of course, goes on and says, voluntary intoxication is not a defense to any crime. So those [39] have to be considered also.

Also, it's significance, there was testimony from both experts that alcohol and drugs can exacerbate a mentally ill person's condition. And consumption of alcohol and drugs can also trigger a latent or dormant illness. These would be as a result of the voluntary ingestion of these substances, Judge. I'm just going to ask you to please keep the drug and alcohol use in your mind as we travel to some other areas this morning.

In comparing Dr. Moran and Dr. Morenz, let's start out with commonalities we have. At least they agree on the legal definition, to a certain extent. They both agree

that schizophrenia alone does not satisfy the insanity defense. And they agree the defendant is schizophrenic.

Now, the defense was somewhat critical of Dr. Moran during the opening statement. They said eight hours beforehand should not be used. That's not anything that's reliable. Yet, when you go through the notes you'll see – or the reports you'll see that Dr. Morenz commented on that fact also, Judge, very minimally, but he did. Dr. Moran was criticized because he supposedly testifies only for the state. He told you that he is on a Maricopa County appointment list. It's a very [40] competitive list to be on, Judge, as you well know, and that means he's appointed for both sides by the courts, so he works on both sides. He told you that there was no strategizing. He told you the times we got together was so he could educate me on the area of law we're in – or the area of medicine we are in. The doctor also told you that the state in this case, or whatever party he's working in with the other case, has no input in what his decision is, what his evaluation is. He said he will work with them in trial prep, but that's it. He makes the professional calls. And, Judge, you'll recall, you know, just because someone says, I'm hired by the state, I'm hired by the defense, that doesn't always mean that's who they testified for. And Dr. Moran told you a story up here on a case I was prosecuting years ago when I brought him up, the defense witness expert said the person was insane. Dr. Moran came back and told me – I'm sorry – yes. Dr. Moran came back and said, yes, he was insane when the defense expert said he was sane. So just because – that was a retained case, Judge, and just because he's retained doesn't mean he's going to say whatever needs to be said. He's a professional.

Let's look at Dr. Morenz's efforts. He met with the defendant four times, first for the competence. There was really – he said it was somewhat [41] helpful just because he got to meet him, got to know him, and but there was really no conversation of any sort. He met him a second time for about an hour-and-a-half under the same circumstances. This was not a competency hearing. This was a meeting. This was for sanity. But, again, this time for about an hour-and-a-half, no give and take, just again got to see him and look at him. Finally, there's a meeting of an hour-and-a-half, complete hour-and-a-half when insanity issue was discussed. This is when Sarah's story comes up. This is where the alien stories come up and all of this. And then he met the defendant Friday, Friday, last Friday morning just before court. So, basically – and that was, of course, after his report had been written and he'd been interviewed. So we have the two meetings with – where there was no conversation between the two individuals and we have the one and one-and-a-half hour meeting, which can kind of be pointed out because he met with Mrs. Clark for even longer, for two lowers, longer than the defendant, and he said he put much weight on her recital of the history of the defendant.

He most recently met Mrs. Clark on June 19th of '03, this year. Dr. Morenz testified she obviously wanted to help her son in any way she could – that's a direct quote, Judge – but, yet, again, the [42] Aaron story was conspicuous only by its absence. The Aaron story that allegedly was the product of the defendant's mind in August of 2000, the Aaron story that just, at least to the state, I believe a week ago, probably two weeks ago yesterday, two weeks ago Monday, I'm sorry, was brought to our attention. It was not brought to the attention of Dr. Morenz until the night

before he testified. It was not brought to the attention of Dr. Moran, the two designated and chosen experts, until I told him after I received a fax when I was in Phoenix because I had to be in Phoenix that week. That's how I learned and that's when I learned, Judge. That's how Dr. Moran was told.

Now, when the Clarks testified, when Mr. and Mrs. Clark testified, you could tell they were doing everything to help, Judge, and there's nothing wrong with that. They're parents. They were trying – they were pushing every time. You'd ask a question that called for yes or no and, boy, three minutes later, I'd just wait and wait for the answer because everything would be volunteered. Yet, Aaron's story, the story that kind of put this all together, makes this all a mystical thing, that's now understandable, was never disclosed. And Judge, we maintain to you, it was not a product of the defendant's mind. It was a product of someone else's [43] mind. Right before trial – or, actually, during trial is when it's first disclosed. We would ask you to seriously consider whether or not there's any truth to that story; and, as a result of that, we ask you to seriously consider some statements made by the parents because, in all honesty, we think that's who concocted this story, Judge.

Let's look at the Title 36 also. Do you think it makes any sense, your Honor, that for one year the family tried to get mental help for the defendant and was unable to? Now, maybe if they were some family with no resources whatsoever, no education whatsoever, maybe someone that doesn't really give a rat's whatever about their kids, but that's not the case. And they had the benefit of a fine, fine lawyer. They were consulting with Mr. Middlebrook and,

obviously, Mr. Middlebrook knows mental health pretty well.

Judge, they claim they never learned until August, two months after the arrest, that they could get mental health for him under the guise of Title 36. Now, I want to ask you, Judge, if you remember when I asked the questions of Mrs. Clark about that and she said, no, we didn't find out until about August. And Mr. Middlebrook stood up and there was an obvious question he could have asked. Basically, he would have been [44] testifying. He could have said, isn't it true that I never gave you any advice about a Title 36? That question was never asked, and there was reason it was never asked, Judge. It's not true. Just like Aaron's story is not true. It doesn't make sense. And, besides, and the – we're not attacking the family. That's not why I'm here. What I'm trying to do is kind of portray this so you'll have some questions about, when you hear statements from the family members, if they're as bad as they say they were, because if they were, wouldn't any parent with the intelligence of them, the resources of them, wouldn't they have done something if it was as bad as they say it was? Please closely scrutinize the testimony, Judge.

We're back on Dr. Moran. We know that – I'm sorry. Dr. Morenz. Dr. Morenz performed no mental health tests on defendant. And, again, these were tests that Dr. Moran said were extremely helpful in diagnosing the schizophrenia of the defendant that Dr. Morenz didn't find it necessary to take the time to go back.

Dr. Moran, if I remember correctly, saw the defendant on two occasions, the first were three-and-a-quarter hours, and that's for his interview, and the second he went back

for another three-and-a-quarter hours to do the mental health tests. [45] He went the extra yard, Judge, so he could come up with a valid finding, not just one. I spoke with him for an hour-and-a-half. And, by God, I can reach a conclusion based on this. He went out and actually did the tests, tests that can be empirically challenged. If they would have come back saying that he was fine, the defense could have had those and looked at them. Again, not done by Dr. Morenz.

Judge, also, I know you are quite familiar with the DSM, the diagnoses, there's five axes on the diagnoses, all five are important. Dr. Morenz reported findings on three. Of course, Axis I, that would be the psychological one, mental health; Axis II and Axis III he just had basically, I think, no finding. I can't recall. No diagnosis on each of those. And the second of that is, of course, behavioral, personality disorders. And even Dr. Moran said it's difficult, it's difficult to do it. Dr. Moran said, I think it's there, it was there beforehand, but it really has no impact at this time. Dr. Morenz just said, well, I can't tell you. On Axis III, physical problems, there probably are none so no diagnosis. That's fine. We know of none. But, Judge, Dr. Morenz completely failed and ignored Axis IV and V, which are crucial in a case such as this when someone has to determine insanity. The issue – that's the way the [46] state believes this issue is, Judge, is he's – he has mental problems but the defense can't show what caused – they can't do that causal connection. And what is the way they would have done that, Judge? One of the ways they would have done it is by showing what the stressors could have been. Axis IV determines stressors, Judge. Dr. Moran said for him to escalate from where he was when his parents left him at that theater to escalate up to a level he had

never, never approached before, required some stressor; alcohol, drugs or some other type of stressor. Dr. Morenz didn't even do the evaluation regarding stressors.

Judge, the friends and associates and parents, family members can assist your deliberation with prong one. They can't help you with prong two. They can't. Here, Axis IV, was a chance for the defense to give you some guidance and show you the causal connection nexus that was there and they failed to do so. And it was – if you remember, I asked Dr. Morenz, was this an intentional omission? And he said pretty much, yes, I thought it was kind of sprinkled throughout the report, is the way I believe he responded to it. Axis V, the GAF score, which he talked about quite a bit, again, a chance to quantify – a chance to quantify the functioning level of the defendant immediately before the murder, no effort [47] made by Dr. Morenz as Dr. Moran did. Now, even though he was somewhat critical – Dr. Morenz was somewhat critical of it, at no time did he volunteer, knowing that there was a GAF score out there, Dr. Morenz during testimony, he at no time volunteered another score. He said it could have been lower. If I recall correctly, that was the gist of talking about the GAF. He said in his testimony, it is a rough scale and it may provide false sense of precision. That was his criticism of it. But its generally accepted in the community, in the scientific community, and it is one of the five standard axes for a DSM diagnostic – diagnosis. I'm sorry.

If the doctor thinks or is so critical of it, he had an opportunity to explain how Dr. Moran came up with a 31, Aspen Hill came up with a 31, state hospital came up with a 31. Granted, Dr. Everley came up with a 20, Judge, and we understand that. But the fact that three of them are within one point or identical, it seems that that's not too

rough, Judge, and that can give guidance. And Dr. Moran relied upon the GAF in determining that the defendant was sane at the time. Also, Dr. Morenz, although he interviewed the mother, he interviewed no other family members, as did Mr. Moran.

The defense claims that Dr. Moran's consulting with other mental health professionals for [48] guidance. They say it's somehow trying to align themselves with us. You didn't hear anyone say that anyone from the state was present for those. That was the doctor talking to a doctor. And that should be applauded, your Honor, not criticized. And, basically, Judge, Dr. Morenz took every shortcut available in both the preparation and the completion of his report. And it's sad but it's true, Judge, it's there. It's in the report, seven-page report, which you can contrast with the 67-page report of Dr. Morenz, which has a complete and full history, which is actually applauded by the defense. But of all these shortcuts, none of them are quite as dramatic as his conclusion on page seven, again, on the seven-page report. In here, one paragraph, it begins: Psychotic as a result of the schizophrenia.

No challenge there, Judge.

When he talks about the Sarah story, he says it could be a result of confabulation, where he doesn't remember what happened and just unconsciously people fill in details.

Dr. Moran told us that there's no known tie in between schizophrenia and memory loss. That was during his testimony yesterday. Judge, if there is truly memory loss, we maintain to you it could just as easily be from the use of marijuana or alcohol. And on [49] cross-examination

the doctor did admit the defendant could just outright be lying with this Sarah story.

Judge, I'm kind of at a crossroads here, whether I want to go through all the things that we have talked about that were not considered in the doctor's report, starting with Thorpe Park, going through every step of the way, seeing the person, being with the mother that day, the mother taking him places when he decided he wanted to go, the mother leaving him there, not feeling she had to stay with him, Sizzler, for an example, then she took him to get a drink, came back, stayed at home with him for a bit, father came, he is taken to the athletic club so he can bathe, father doesn't stay with him, he goes and picks him up when the defendant is ready and calls, they go to the movie, they watch the movie together, nothing unusual, the parents state he's in good spirits, he's happy, everything is fine, and at this point they say, as fine as the defendant can be, so be it what they told the police and admitted it on cross-examination, they said he was fine, he was in good spirits, and that's why they left him at 9:30 that evening at the theater.

Now, what happened after that, we don't know until sometime after 1:30. We don't know if he stayed and watched the other movie, Gone In 60 Seconds. [50] But we do know that at some point in time he somehow was able to get to his home, didn't have a car, doesn't have his bike, he only rode his bike once and that was to take the gun away, somehow got to the house, somehow got in, got into Gentry's room, got the keys, somewhere got a gun, went out, opened the truck, got in the truck, put the keys in, started the truck, and drove away, using the clutch, using the shift, because we know it's not automatic. We know all of the facts of him driving around from sometime probably

before 4:00 a.m., some people say 3:00 but I think that's too early, until at least 4:50 when Officer Moritz is killed. We know he's blasting the music. He does the route in that one area of University Heights 22 times. And it makes me think back to Thorpe Park, Judge, just what he said he was going to do, he was going to taunt the police officer and he was going to kill him with his .22. Officer Moritz comes up, puts the overhead lights on, takes 50 seconds for him to stop, stops just a half block away from his home. Officer Moritz we know had to use the siren for a period of time. We know he exited the vehicle because the last words he said to dispatch other than 999 were, I'm out with him, and he called in the license number. We know he's ambushed. We know he's killed. And we do agree that he fired two shots. We know the defendant [51] ran, was able to conceal himself for 16-and-a-half hours, I think we figured it out, and that he was able to get rid of the gun before he was arrested. You have to remember, he still had gunshot residue on his hands, which makes one think he kept the gun up until towards the end. We know he ran from the police, but we know he went to his home. We know he ran from the police and he did not stop until he was confronted basically by a laser on his chest from Detective Higgins. He resists to a certain extent, not much, and he's arrested.

Judge, you'll remember that's pretty much the same chronology I went through with Dr. Morenz. I said, did you mention any of that in your report? And he said, no. I don't put things in about the police reports.

Judge, on an insanity case, you know, you have to look at that. That's how you make the nexus. You consider things like that. And he said, oh, I considered those. But you'll remember at great length we went through about

how do you write a report, you know the importance of reports, you know how detailed they have to be, you know that the Judge is going to rely upon that, the parties, they could actually mean something bad for the defendant, yes, all of that, but not one mention of it. And I believe, Judge, I did ask him a question [52] during his testimony and I again said, you gave the Judge no guidance on any of these areas in your report, and he said, that's correct. I was specifically talking about Thorpe Park and the fact he ran during the transcript.

Again, just like before with the GAF, Judge, this was the defendant's chance to show the causal connection that is required under Arizona law. And it wasn't there, either in his testimony or in his report.

Judge, let's go through a little bit more on his conclusion, I would implore you to read a few times, but the last couple sentences: It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense. And I think everyone's in agreement with that, Dr. Morenz and Moran agreed, but given he was very psychotic before and after the alleged offense, it is reasonable to infer that his perceptions of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality; thus, there is considerable evidence that indicates Mr. Clark probably did not know his acts were wrong at the time of the alleged offense.

And, Judge, you'll remember, we went over the DSM, the forensic portion, things that they – doctors can do and cannot do in a forensic setting, and one is they cannot infer that a person met a legal [53] definition because he met a clinical definition. And I'd like to read this into the record again, Judge –

MR. MIDDLEBROOK: The evidence is closed, Judge, so he can't read it.

MR. POWELL: What was that?

THE COURT: He said the evidence is closed, but you can read it.

MR. POWELL: This has already been read in, Judge.

THE COURT: You're just reaffirming what's in the record.

MR. POWELL: And, again, this is on Roman numeral XXXII, Use of DSM-IV in Forensic Settings: When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood.

And that – this is what I read in before: In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a mental disorder, mental disability, mental disease, or mental defect.

And, Judge, you'll recall that I asked Dr. Morenz specifically, mental disease and mental defect, are the phrase on our 502 and he agreed.

[54] So then if we go on down, about middle of the page on Roman numeral XXXIII, moreover. Moreover, the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even

when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

Now, Judge, I asked Dr. Morenz, I said, aren't you asking the Judge to do something you're not allowed to ask? And he said, no, I'm the one that's inferring and I'm just giving that to the Judge as my opinion.

I would ask, Judge, you, if you get a chance during deliberations, please review this and compare it to the last few sentences in his conclusion and see what the doctor is asking you to do, see if he is living within the bounds of his own profession, his own professional standards.

Judge, what I'd like to do is, I'm not going to be much longer, but did you want to break now?

THE COURT: Keep going. Are you just [55] about done? Well take a break when you get completed.

MR. POWELL: When I get?

THE COURT: When you get done.

MR. POWELL: Okay. I'd like to go into a different area here, Judge. And what I'd like to do is give the Court a very brief legal history of the phrase clear and convincing. And it kind of came to a head in State versus Renforth, R-e-n-f-o-r-t-h. And, Judge, we do have a memorandum of law that we are going to present for your deliberations in that area.

THE COURT: I have already read it, counsel. I read it yesterday when it was presented to me.

MR. POWELL: Okay. I'm going to go into some other things. Basically, what happened here was a case was reversed because of an improper clear and convincing instruction was given in an insanity defense. This was with the Court of Appeals, Arizona Court of Appeals in '87. Review was granted by the supreme court. It was then rejected by the supreme court. And it was rejected because State versus King had been decided by the Arizona Supreme Court, which took care of the issue of the definition of clear and convincing.

And, Judge, what I would like to do is read again one portion of the conclusion, then I'd like [56] to put this up and let you look at this. It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense, but given he was very psychotic before and after the alleged offense, it is reasonable to infer that his perception of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality; thus, there are considerable evidence that indicates Mr. Clark, he probably did not know his acts were wrong at the time of the alleged offense.

And, Judge, this is State versus King, Arizona Supreme Court case, September 22 of 1988. This is the law in Arizona at this time. The correct instruction would have apprised the jury that the clear and convincing standard is an intermediate standard between truth beyond a reasonable doubt and truth by a preponderance of the evidence. And the clear and convincing evidence is evidence that makes an existence of the issue propounded highly probable. Not probable, Judge, this is not a dicta opinion. This is what the Arizona Supreme Court has said the evidence has to reach to be an affirmative defense on an insanity case, because King was a first degree murder insanity

case, Judge. It was written by Justice Feldman and was concurred by all other justices.

[57] Judge, we know that we are bound by definitions of – strictly bound by definitions handed to us by appellate courts. Here, the supreme court has not said probably. The supreme court has not said a little bit more than probably. They have said highly probable. And, again, go back and contrast it to what was in the report of the doctor, Dr. Morenz. And, Judge, just to – just to make sure that nothing changed during testimony, I have gone through his transcript and on page 95, on the bottom of the page: "So I'm not asking the Court to make this inference. I'm suggesting that is what I believe probably happened, but it's up to you, Judge Coker, to decide whether he believes that's the case or not."

THE COURT: For the record, you're citing from his trial transcript?

MR. POWELL: Yes, sir, of August 22nd, page 95 and 96.

THE COURT: Thank you. I just wanted to make sure that's trial testimony.

MR. POWELL: Judge, that was his last comments on his opinion. He was not asked any more questions.

We know defense counsel knew the definition of clear and convincing because it was the first thing that was put up on the – by the projector [58] during opening statements at the mental health phase of this trial. It was the first definition put up there. No questions were asked of Dr. Morenz to see if he would reach the standards that he failed to reach. He said, probably based upon an inference.

Actually, that's all he would have before you, Judge. That's the closest thing you have to a nexus, and it's legally insufficient.

And I'm sure the defense will get up and say, well, Judge Coker, you can certainly look at all the evidence and say, I think it's highly probable, but, Judge, is that fair? The witness was here. He said probable. Everyone in the courtroom knew what the definition was and he didn't go to that definition. He didn't reach it. And there is a distinction between probable and highly probable, Judge. And you'll notice on – in the King case, the issue's highly probable, it's in quotes. It's not an oversight. We all know that Justice Feldman was a acting individual. This is the law in the State of Arizona. The defense hasn't done that, Judge. They beat the first prong to death, and we just sat back and watched because we completely agreed with them. But they can't make prong two, Judge, and that's why, basically, they refuse to even confront that prong. Thank you.

THE COURT: Thank you, Mr. Powell.

[59] We'll take about a five-minute recess at this time before we conclude with Mr. Middlebrook's closing remarks. Thank you, everyone.

(Whereupon, a recess was had.)

THE COURT: Let the record reflect the presence of the parties.

Mr. Middlebrook, you may proceed with your final closing.

MR. MIDDLEBROOK: If I can just wait half a second, Judge.

THE COURT: Certainly.

MR. MIDDLEBROOK: I will apologize up front in the front of this, and the reason I'm going to apologize is because I'm going to carry on probably longer than I really need to in this final closing because I'm going to show you right now, Judge, how desperate the state is to try to show that Eric was not psychotic at such a level that he was grossly impaired with reality.

There is a lot of testimony – or excuse me – a lot of argument about Dr. Morenz's opinion and his testimony that somehow – and I assume the state reviewed his testimony extremely carefully so they could use any nub in it to try to discredit Dr. Morenz.

Now, this is an expert they use on a [60] regular, regular basis. Now, I asked your court reporter for a copy of his transcript, as well, and I was given a rough copy so I'm not sure exactly the page this testimony falls on, but it's absolutely disgusting the state would argue what it does when you see this.

Dr. Morenz testified: "Based on your review of the records, your observations, your training, your experience, is it highly probable that Eric, as a result of a mental disease, was insane at the time of the shooting?"

And his answer was: "Yes."

Now, on my rough copy that's page 28, but I'm not sure what the official transcript shows.

Yes, Judge, highly probable, based on everything he did. And, yet, they have really the audacity to argue that he never said that. I mean, it's disgusting. But is it unusual in this case? No, because we know that the police

reports have remained inaccurate, especially when you compare a transcript to a report. The state mentioned Nancy Edmondson when she said she testified, I never told that officer he was on acid. Never.

The officer, they bring him in and he said, well, my report shows – well, you know, the problem is, we know what the problems are with police [61] reports and what people have actually stated. Put it in that category, Judge. And I guess that when we're looking at having you compare reports, I should have attached a five pound weight to Dr. Morenz's report because what we're talking about is, I guess if you weigh the reports literally, 67 pages versus seven, they win. But, you know, what do they win on? Evidence clearly constantly demonstrated was half provided to Dr. Moran or he flat out didn't know it at all, or the evidence that he was relying on critical issues was flawed. Flawed.

When we talk about – when the state talks about – and this is their thing, but for the mental disease there would be no criminal activity. Let me show you that again to demonstrate with pictures and what that means. But for the mental disease, this person right here would not have been in criminal activity. But for the mental disease, this is what he looked like.

Judge, there's no question that it's highly probable Eric was psychotic at the time of the shooting. And, of course, I showed you – or asked that specifically – question specifically of Dr. Morenz. I said, was he insane? And he said, it's highly probable he was. But it does tell you – and I'm not going to cite you supreme court cases because this case is about the facts, not about what the supreme court has done and [62] not about what a memorandum I just

got, that when I started my case, I told you clear and convincing evidence was highly probable. I don't know why we're talking about supreme court cases at the trial court level, unless there's nothing else to talk about, you know.

So what do you talk about? What do you try to show? That Terry and Dave created, fabricated, lied to you about the Aaron story? Okay. Well, let's talk about the credibility as to why they would do anything they could, including perjure themselves, including perjure themselves to help Eric. All right.

Well, let's see, on the day of the shooting, Dave and Terry said Eric was completely out of his mind. He didn't know what he was doing. He wasn't normal. When we took him to the show, he was completely 100 percent totally psychotic. He was running naked through the hallways with a rosebud between his teeth. Is that what they said? No. In fact, look at what they said to the police. He kind of looked normal to us, odd for Eric but, you know, normal for Eric.

But what did the two people that saw Eric say? They said – Carden Hakes said he looked like he was under the influence of something. Now, did the parents tell you that? No. They didn't try and make Eric look worse than he was.

[63] When Adam Lozano spoke to Eric, this is at 5:00 o'clock, this is about the same time Terry and Dave would have been taking Eric to the Flagstaff Athletic Club. Right? Did they say he was so incoherent you could barely understand him? No. Adam Lozano told you that. These are parents that would come in and perjure themselves to you, Judge? If they were going to do it, why stop there? Why stop at the Aaron story?

The Aaron story, coincidentally, the state forgets to mention, is consistent where Eric tells the detention officers, within a week he tells his parents this Aaron story, he's accusing the detention officers of being aliens. It's all part of the experiment. Most white people are aliens. I'm being held on an alien base. All the same time. You judge their credibility based on that. You judge their credibility based on what other people have told you.

And the Title 36, yes, competent counsel would advise them. First of all, those conversations were completely privileged, but I thought, let's go ahead and see where you're heading with this because, certainly, we spent most of the time with Terry Clark not talking about Eric's state of mind, talking about her state of mind.

Now, why are we wasting time with that? [64] Because there's nothing else to talk about. Because they know – I mean, they know. Were they going to bring in an expert to say that Eric was just perfectly fine that day? Hell no. They knew that there was way too much evidence for that. Considerable evidence is the words used by Dr. Morenz.

You can see the pattern here, Judge. I get Dr. Moran's notes that I asked for a month ago the day before he testifies. I get his report the day before he testifies – before the day before he's interviewed. In trial, critical transcripts are provided to me in the middle of trial. Come on. This has always been about the state trying to – trying to – I don't want to use the word fabricate because that's too strong a word – to hold back what's really there. That's probably the best way to put it in context. They've held back and held back and held back, because they know what I know and what you know what the evidence has

showed. Eric was insane, by legal definition, by mental health definition, by factual definition, Judge.

How many times have you heard prosecutors in criminal – in criminal trials in front of a jury say, circumstantial evidence is the same as direct evidence. Arizona gives it the same weight. And you can, too. The law gives it the same weight. If you go to bed at [65] night – you've heard this argument – you go to bed at night and you wake up and there's snow on the ground, you can say, it snowed last night. That is circumstantial evidence. Now, was there a videotape of it snowing? No, but we can look at the proof, we can look at the results, we can look at the footprints that are left afterwards.

Judge, here, look at the footprints. We've got – we've got the popular student, top of his class, very popular, very well liked, warm, loving son, warm, loving friend, funny guy. And in a year, in a year, not because of drug use, not because of drug use – the professionals write that out – Dr. Potts, the consultant, gets rid of that, Judge – in a year he goes from being a very popular, most likely to succeed kind of guy, going to college, going to play football, to sitting – I don't know if you can imagine this. You're at a high school and that you're sitting alone. Alone. No one's there. Your friends are gone. Your parents are aliens. And you're so frightened that you're carrying guns to protect yourself – excuse me, your Honor.

You know, the state has an obligation once the burden of proof has been met by a defendant to come in and review the evidence. They haven't. They haven't. There is no ice cold evidence, ice cold evidence, none. None. They rely on drug use, marijuana use, alcohol use [66] as cause of psychosis; yet, their people have ruled it all out. And,

yet, they still hand it up to you because they're pounding on a dead horse. They have nothing else to argue, nothing else to ride. They can't even tell you what happened at the time of the shooting.

We know there's a dent in the truck. We know that there is Vaseline over the driver's door window of this truck. We know bullets have been sprayed everywhere. They can't even tell you whether this happened in a struggle or not. They can't tell you whether this person fired the gun. They can't tell you whether Eric was running away, whether he was standing still. They don't have any of that. And, yet, they want you to believe that he was not psychotic, in light of overwhelming evidence that minutes before his eyes were gone, he was gone. And that's been based on the evidence, repeated evidence, not from Terry and Dave, some of it from them, but friends. Aaron Fitzhugh, who days before tells us he had a blank look, he wasn't there. This isn't a best friend. This is a kid who barely knows him.

We're talking about whether their expert has ever opined whether it was highly probable Eric was not insane. Here's their expert's opinion: Within a reasonable degree of psychological certainty the opinion [67] is offered that –

THE COURT: Counsel.

MR. MIDDLEBROOK: I'm sorry. Excuse me, Jonna.

– the opinion is offered that at the time Officer Moritz was murdered, the defendant was not suffering from a mental disease or defect of such severity he did not know that the criminal act was wrong.

No opinion, by the way, as to whether it was highly probable he was not, was there?

And let's talk about highly probable standard, that Dr. Moran has told us Eric should have been committed pursuant to Title 36. That's a clear and convincing standard burden of proof that has to be met to make that commitment.

Want to talk about opinions and what they're based on? That's Moran. He is basically conceding it was highly probable Eric was a danger to himself or others. Why is that relevant? Because when we talk about the GAF score and you look down it and you get lower and lower and lower into the GAF score, what's it talk about? Whether it's likely someone would be dangerous to someone else. Judge, 31 was the high of the day. It was a lot lower. 31 is your incompetent to stand trial. It was a lot lower, even by Moran; Morenz [68] confirms it.

Stressors. First of all, I'd like to point out that Dr. Morenz has been used by the state repeatedly. I'm certain if they thought for half a second his report, which they had disclosed to them for a long period of time, was somehow deficient, they could have gone back to all the other reports Dr. Morenz has authored for the state and compared it and said, look, Doc, you know, all these other cases you always came to Axis IV and Axis V. None of that evidence was presented because they know that Dr. Morenz's report is just fine. You don't need a 67-page, 20-pound regurgitation of the police reports to reach an opinion regarding whether Eric was insane or not.

And if you dispute that, remove the history part of Dr. – of Dr. Moran and look at what's left, just a few pages.

Everything else at the back of his opinion is basically photocopied pages of DSM-IV.

You have to remember what the test shows. Yes, he reached this clinical decision, blah-blah-blah-blah. I have already told you what the test showed.

Mr. Powell says, Judge, by the way, why bring up Dr. Potts or up the state wasn't even there when they were being consulted and creating a strategy? Well, [69] Dr. Potts was and Dr. Potts is their consulting expert. So we know that there was definitely a strategy in what Dr. Moran was doing.

Also, the Sarah story. Judge, they bring up the Sarah story. Remember what Dr. Moran said about the Sarah story? It confirms the diagnosis of schizophrenia. It confirms it because it reflects on Eric's lack of insight.

When you go through the evidence, you're going to see that Eric had apparently another gun in a backpack. This thing about going and getting guns and all that, there was no plan there, Judge. They've even attempted to say he must have held onto the gun because the gunshot residue evidence was that it was on his left hand.

Well, Judge, wait a second. And so he therefore kept the gun? It's like, what? What are you talking about? That expert never said that. The gunshot residue is a result of the shells going off, not how long you hold the gun. But, again, it reflects on where the state's level of certainty is and their ability to refute the evidence that's been presented to you.

Judge, I know I ended my opening closing kind of the same way and that is this: Is if there was ever a moment where Eric was rational in the months [70] before the

shooting, I'm certain that the hundreds of officers that investigated this case, they would have brought it to your attention. They never did because there's none to show.

Here's a kid who is a loner. He's up all night. He's wild-eyed. He's carrying guns because he believes the aliens are that much out to get him. He believes the aliens are constantly trying to poison him. And as he told Dr. Moran, they were trying to kill me a lot.

Judge, this kid was absolutely terrified. It's just that simple. His wild eyes that were seen moments before, his reality was gone. There was a gross impairment to his reality. There is no question of that. Thank you.

THE COURT: Thank you, Mr. Middlebrook.

I will take this matter under advisement at this time.

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

H. Jeffrey Coker, Judge
Division 3 — Deborah Young, Clerk
Date: September 3, 2003 — Lucy Luedke, Deputy Clerk

MINUTE ENTRY

| | | |
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| THE STATE OF ARIZONA,<br>Plaintiff,<br>vs.<br>ERIC CLARK,<br>Defendant. | ) | Case No. CR 2000-0538<br>(Filed Sep. 3, 2003) |

ACTION: SPECIAL VERDICT

Before announcing the Verdict, I would like to thank the Moritz and Clark families and their supporters. This case is the saddest most tragic case I have sat on in almost 20 years on the Bench. Words cannot describe the loss to both families, the family of law enforcement and this community, and yet you have conducted yourselves before this Court with dignity and grace. I am confident that you all will continue to do so and that this Verdict can begin to bring some closure.

I would also like to thank the attorneys. The case was well prepared and professionally tried. Both sides advocated with conviction and yet sensitivity to the deep feelings that this case has aroused. Thank you for the respect that you showed to the court, to the witnesses and to each other. The State and the Defendant were exceedingly well represented here. Thank you.

This Verdict is not for one side and against another. There are no winners in this case. It is a recitation of the law, a finding of the facts, and an application of the law to those facts.

The court has divided its Verdict into two parts:

First Verdict

The Court has reviewed the entire record and the law. The Court first finds beyond a reasonable doubt that the Defendant Eric Clark shot and caused the death of Police Officer Jeff Moritz.

Second Verdict

The Court notes that the Defendant has entered a Plea of Guilty but Insane. Pursuant to §13-502 (c) the Defendant bears the burden of proving the elements of this plea by clear and convincing evidence. The statute also requires a two prong test to prove this defense:

First: was the Defendant "afflicted with a mental disease or defect?"

Both experts, all lay witnesses, and the attorneys agree that the Defendant suffers from a qualifying mental disease: paranoid schizophrenia. The Defendant clearly began suffering from this illness well before June 21, 2000 and suffered from this illness at the time of shooting Officer Moritz. I quote from the report of Dr. Moran, the state's Expert Witness. "There seems to be little doubt that on June 21, 2000, the Defendant was suffering from paranoid delusions."

Having established the first prong, the law then requires the Defendant to prove that the mental disease or defect was so severe that "the person did not know the criminal act was wrong." Therefore, it is not enough under the law for the Defendant to prove that he had a mental disease, or even that the mental disease affected his conduct at the time of the shooting. The Defendant must prove by clear and convincing evidence that the disease or defect caused him to not know his criminal act was wrong. Therefore, that is the focus of the Court.

To make this determination the court looks to the facts of the crime, the evaluations of the experts, the Defendant's actions and behavior both before and after the shooting, and the observations of those that knew Eric.

The court considered the following evidence:

- Defendant's statements at Thorpe Park to Jason Tackett and Mark Fields;
- Defendant's actions in driving through a residential area early in the morning with loud music to attract law enforcement;
- That the Defendant was aware that Officer Moritz was a police officer:

  A.) Emergency lights on the police car were on;

  B.) Siren was on briefly;

  C.) Police car clearly marked;

  D.) Officer Moritz was in uniform;
- Defendant's general level of functioning before and after the shooting;

- The lack of any precipitating event prior to the shooting which would have caused him to break with reality;
- After the shooting, the Defendant fled the scene;
- For 16 hours after the shooting Defendant avoided capture. He saw police cars and police and hid and ran from them.
- Defendant disposed of the murder weapon;
- Defendant knew enough to stop resisting once his life was in jeopardy;
- After Defendant's apprehension he made comments acknowledging that he was aware of other charges pending: " . . . potential problems (sic) heading my way, I don't know for sure because I got arrested earlier."
- The Defendant in the Interrogation Room followed instructions and complied with requests.

From all of this the Court must conclude that, while the Defendant was affected by his mental illness, it did not, pursuant to the requirements of the statute, distort his perception of reality so severely that he did not know his actions were wrong. Accordingly, the Court finds the Defendant guilty of the First Degree Murder of Officer Jeff Mortiz.

Sentencing is set for *October 2, 2003 at 10:00 a.m.*

The Court orders Probation to prepare a Presentence Report in this matter.

These proceedings are adjourned.

/s/ H. Jeff Coker
H. Jeffrey Coker,
Judge of the Superior Court

**IN THE COURT OF APPEAL**
**STATE OF ARIZONA**
**DIVISION ONE**

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|---|---|
| STATE OF ARIZONA,<br>Appellee,<br>v.<br>ERIC MICHAEL CLARK,<br>Appellant. | 1 CA-CR 03-0851<br>1 CA-CR 03-0985<br>(Consolidated)<br>DEPARTMENT D<br>**MEMORANDUM DECISION**<br>(Filed Jan. 25, 2005)<br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)<br>(Amended by Order filed 5-5-05) |

Appeal from the Superior Court in Coconino County

Cause No. CR 2000-0538

The Honorable H. Jeffrey Coker, Judge

**AFFIRMED**

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Terry Goddard, Attorney General — Phoenix
By Randall M. Howe, Chief Counsel, Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

David Goldberg
Attorney for Appellant — Flagstaff

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**SNOW**, Judge

**¶1** Eric Michael Clark, appeals from his conviction and sentence for first degree murder, a Class 1 felony. He argues: (1) that substantial evidence did not support his conviction for first degree murder; (2) that the court abused its discretion in finding that he had not proven, by clear and convincing evidence, that he was insane at the time of the murder; (3) that Arizona Revised Statutes ("A.R.S.") section 13-502(A) (2000) violates the due process and equal protection clauses of the Arizona and United States Constitutions; and (4) that his sentence of life in prison without the possibility of parole for twenty-five years is disproportionate of the crime committed and therefore violates the Eighth Amendment interdiction against cruel and unusual punishment. For reasons set forth below, we affirm.

## FACTS AND PROCEDURAL HISTORY

**¶2** We view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the appellant. *State v. Fontes,* 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

**¶3** In June 2000, a few weeks prior to the murder, Clark commented to some friends having a barbecue in a park in Flagstaff, Arizona, that he wanted to shoot police officers. One friend remembered him saying: "If I came up here with my .22 caliber hand pistol . . . and started firing off, when the police come, I will get them out of their cars and start – I have rifles and I'll start shooting them in the head." That same friend recalled another instance a month or two before the shooting in which Clark made a comment

that suggested that he was angry with police and "wanted to show them."

¶4 Sometime in the early morning of June 21, 2000, Clark went to his parents' house on University Heights Drive South and took the keys to his brother's green Toyota pickup truck. He then began driving around an adjacent neighborhood, blaring loud music from the radio and disturbing the residents. One resident estimated that Clark drove about twenty-two laps around the same block. He called the police to report it around the eighteenth lap.

¶5 Flagstaff Police Officer Jeffrey Moritz responded and located the pickup truck. It started "running from" him, and Moritz activated his emergency lights and made the stop. He informed dispatch that he was going to "be out with him," meaning the driver of the truck. Moments later Moritz radioed, "999[1], I've been hit. 999, I've been hit." Moritz then stumbled towards a nearby home, holding his chest and calling for help, until he collapsed on the ground. Clark abandoned the truck and took off on foot towards his house.

¶6 Residents heard two sets of gun shots: one a series of shots from Clark's .22 caliber handgun; the other, shots from Moritz's .40 caliber service weapon. One resident had also heard a strong voice give several commands to stay inside the vehicle shortly before hearing the shots.

¶7 Several officers converged on the scene based on Moritz's "999" call. Flagstaff Police Captain Brent Cooper, who lived nearby, also responded after he and his wife heard a police siren and gunfire. He was the first on the

[1] This is the code for "officer needs assistance immediately."

scene, arriving within "a couple of minutes" of hearing the gunshots. He found Moritz lying on the ground, twenty feet behind his police car, face up, with a small group of civilians around him. Moritz's service revolver was on the ground to the left of his body. When Cooper saw Moritz's face, he "was afraid he was gone then." All attempts to revive him proved futile.[2]

¶8 Moritz's police car was parked in the street a little behind the Toyota pickup truck. The police car's engine was still running and the overheard emergency lights were activated. The pickup truck's engine was off and its driver's side door was open.

¶9 Based on the truck's registration, police officers proceeded to Clark's parents' home on the adjacent block and set up a perimeter around the house. Clark was not found in the house, and his mother advised officers that he was "missing." At 9:00 p.m. on June 21, a Flagstaff police officer spotted Clark on a sidewalk on University Heights Drive, but Clark ran away with several officers in pursuit. Police subsequently arrested Clark at gunpoint.

¶10 When he was arrested, Clark had gunshot residue on his hands. Police found the .22 caliber handgun Clark used to shoot Moritz in a yard in the vicinity of the shooting. The gun was inside a knit cap, and tests of the gun and the cap disclosed DNA that matched Clark's.

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[2] The medical evidence at trial was that the blood supply to his brain would have been restricted as two of the four major vessels to the brain had been impaired by the trajectory of the bullet, which would have limited his ability to "mobilize and do much of anything physiologic" within two to four minutes of being shot.

**¶11** The state charged Clark with one count of first degree murder, for intentionally or knowingly killing a law enforcement officer who is in the line of duty. A.R.S. § 13-1105(3). The state did not seek the death penalty. On March 28, 2001, the trial court accepted the parties' stipulation that Clark was not competent to stand trial and committed Clark to the Arizona State Hospital for treatment. On May 8, 2003, the trial court found that Clark was competent to stand trial.[3]

**¶12** Clark waived his right to a jury trial, and the matter was tried to the court. In addition to other theories, Clark's primary defense was that he was legally insane at time he shot Moritz.[4] At the conclusion of the trial, the trial court rejected Clark's insanity defense and found him guilty of the first degree murder of Officer Moritz.

**¶13** On October 2, 2003, the trial court sentenced Clark to life in prison without the possibility of release on any basis until he had served a minimum of twenty-five calendar years. Clark timely appealed. He also filed a motion to vacate the judgment, which the trial court denied. Clark then timely filed a supplemental notice of

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[3] The trial court specifically found that Clark was able to understand the nature of the charges, and that he could, "if he chooses, assist his attorney in his defense." The court further found that Clark's "status at this point in time is one of volition; in other words, he is choosing not to cooperate with his attorney at this time as opposed to being unable to."

[4] Defense counsel also argued that Clark was delusional and therefore did not know that Moritz was a police officer or that the shooting might have been the inadvertent result of a struggle over the weapon. He therefore asked the court to consider lesser included offenses of second degree murder and manslaughter.

appeal from the denial of the motion to vacate judgment. Both matters were consolidated on appeal.

**¶14** This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (1992), 13-4031 and 13-4033(A)(1) (2001).

## DISCUSSION

### (1) *Sufficiency of the Evidence*

**¶15** Clark maintains that there was insufficient evidence to support his conviction for first degree murder of a police officer.[5] He rests this argument on his claim that the state presented only circumstantial evidence to show that he (1) intentionally or knowingly caused a death and/or (2) that he intended or knew that he was killing a police officer. He therefore contends the trial court abused its discretion when it denied his motion for directed verdict.[6] We conclude that it did not.

**¶16** We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Sullivan,* 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). In so doing, we view the evidence in the light most favorable to supporting the verdict. *Id.* (citations omitted). This court "will not reverse

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[5] A.R.S. § 13-1105(A)(3) provides in relevant part that a person commits first degree murder if: "Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

[6] Ariz. R. Evid. 20(a) provides in relevant part: "On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction."

a trial court's determination on grounds of insufficient evidence unless there is a complete absence of probative facts or where the judgement is contrary to substantial evidence in the record." *State v. West*, 173 Ariz. 602, 610, 845 P.2d 1097, 1105 (App. 1992) (citation omitted).

**¶17** When reviewing the sufficiency of the evidence, we make no distinction between the probative value of direct and circumstantial evidence. *State v. Bible,* 175 Ariz. 549, 560 n. 1, 858 P.2d 1152, 1163 n. 1 (1993). "Evidence is sufficient if there is more than a scintilla of proof for a reasonable mind to support the conclusion." *West,* 173 Ariz. at 610, 845 P.2d at 1105 (citing *State v. Goswick,* 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984)). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial." *State v. Jones,* 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997) (quoting *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981)). The evidence at trial and reasonable inferences therefrom support the conclusion that Clark knowingly and intentionally shot Moritz and knew that he was a police officer when he did so.

**¶18** The evidence at trial established that Clark was angry with police officers and fantasized about ways to retaliate or "show them," suggesting a motive for his actions. It also showed that, in driving the pickup truck with its radio blaring, Clark had engaged in behavior that would attract law enforcement to the neighborhood. Clark was playing a "rap CD" at the time that contained "many antisocial attitudes" and included lyrics expressing violent attitudes toward police officers.

**¶19** Clark was armed with a .22 caliber handgun with which, according to medical evidence, he shot Moritz from

a distance of "at least 2 to 2 and a half feet." The trial court was permitted to infer from Clark's use of the weapon that he intended or knew that he would kill Moritz. *State v. Herrera, Jr.*, 176 Ariz. 21, 30-31, 859 P.2d 131, 140-41 (1993). That inference is further supported by the fact that the bullet that killed Moritz entered his body at the back of his left armpit, which was consistent with Clark having been "to [Moritz's] left and behind him" when he shot him. This permits the inference that Moritz was attempting to move away from Clark when he was shot.[7]

**¶20** One witness testified that she first saw Moritz standing alone outside his vehicle and then saw him at the rear of his police vehicle and "almost immediate[ly]" heard "popping sounds" just before she saw him there. This would have been consistent with Moritz's having tried to take evasive action to avoid being shot. That same witness then saw Moritz go away from his police car, towards the spot where he ultimately collapsed, while a person that appeared to be a male, moving "at a real fast walk or a jog," went in the opposite direction, away from the green truck. Evidence of flight from or concealment of a crime usually constitutes an admission by conduct, and may permit the inference of a consciousness of guilt for the crime charged. *Bible*, 175 Ariz. at 592, 858 P.2d at 1195. All of this is sufficient evidence to support the inference that Clark intentionally or knowingly shot Moritz.[8]

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[7] In this regard, it is also noteworthy that Moritz shot with his left hand.

[8] Clark's theory at trial and on appeal is that Moritz and Clark may have been struggling over Clark's gun when it went off, however there is no evidence of this in the record. Clark bases this argument on the time that elapsed relevant to when Moritz got out of his car, when

(Continued on following page)

**¶21** Furthermore, there is sufficient evidence to support the inference that Clark knew that Moritz was a police officer when he shot him. Moritz was in full uniform and driving a fully equipped patrol car at the time. Witnesses testified that the police car's siren was activated at the stop and the emergency lights engaged. Although, it was early morning, it was already getting light outside. The fact that Clark pulled over in response to the siren and lights also indicates that he realized he was being stopped by a police officer.

**¶22** Based on this evidence, we cannot say that the trial court abused its discretion in denying Clark's Rule 20 motion. *Sullivan,* 187 Ariz. at 603, 931 P.2d at 1113.

(2) *Determination that Clark was Not Insane*

**¶23** Clark also argues that the trial court abused its discretion when it determined that he did not prove, by clear and convincing evidence, that he was legally insane at the time he shot Moritz. Our review of the record shows that it did not.

**¶24** Section 13-502(A) provides that "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Legal insanity is an

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he was heard to command Clark to stay inside, and when the first gun shots were fired. However the radio transmission evidence shows that thirty seconds elapsed from the time Moritz likely exited his car, after transmitting the license plate number, and radioed that he was "hit." Based on this evidence, Clark's theory that Moritz may have been recklessly shot during a struggle seems speculative at best.

affirmative defense that a defendant must prove by clear and convincing evidence. A.R.S. § 13-502(A), (C) (1996).

**¶25** We review for abuse of discretion a trial court's finding that a defendant did not prove an insanity defense by clear and convincing evidence. *State v. Zmich,* 160 Ariz. 108, 111, 770 P.2d 776, 779 (1989). We view the evidence in the light most favorable to supporting the trial court's judgment and presume that the judgment is correct if there is any reasonable evidence in the record to sustain it. *State v. Veatch,* 132 Ariz. 394, 396, 646 P.2d 279, 281 (1982). Furthermore, we will not substitute our discretion for that exercised by the trial court. *Id.*

**¶26** To prove an insanity defense, a defendant must establish, first, that he was suffering from a mental disease or defect and, second, that the mental disease or defect was of such severity that it rendered him unable to understand the wrongfulness of his conduct. A.R.S. § 13-502(A). Neither party disputed the fact that Clark was suffering from a mental disease, paranoid schizophrenia, at the time of the murder, and that he had suffered from it for quite some time.

**¶27** The trial court agreed that Clark had proven that he was "afflicted with a mental disease or defect" at the time of the shooting, but found that he had failed to prove, by clear and convincing evidence, that this disease or defect prevented Clark from knowing that shooting Moritz was wrong. In reaching its decision, the trial court specified that it had considered "the facts of the crime, the evaluations of the experts, the Defendant's actions and behavior both before and after the shooting and the observations of those that [sic] knew Eric." The trial court was justified in

considering all of these factors and the evidence in the record supports its decision.

**¶28** Clark's expert witness, Dr. Morenz, concluded that Clark's mental disease rendered him incapable of appreciating that his conduct was wrong. The State's expert, Dr. Moran, concluded that it did not. To the extent that the trial court may have accepted Dr. Moran's evaluation over Dr. Morenz's, it was entirely within the trial court's province to do so. As the trier of fact in this case, it was free to believe or disbelieve the testimony of either expert, *State v. Sanchez,* 117 Ariz. 369, 373, 573 P.2d 60, 64 (1977), and resolve any conflicts in the psychological testimony. *State v. Mauro,* 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

**¶29** In reaching its decision that Clark had not proven insanity, it also appears that the trial court gave significant consideration to Clark's own actions both before and after the shooting. For example, its judgment specifically noted Clark's actions in driving through residential neighborhoods with loud music "to attract law enforcement," as well as his behavior in evading capture before his arrest at gunpoint and in disposing of the murder weapon afterwards. The mode of operation of the mind may be ascertainable from Clark's conduct; therefore Clark's conduct is admissible into evidence as it may indicate sanity or insanity or at least throw light one way or another on the issue. *See State v. Hurles,* 185 Ariz. 199, 205, 914 P.2d 1291, 1297 (1996) (quoting 2 Wigmore on Evidence § 228 (1979)). The trial court in this case correctly considered Clark's pre- and post-crime behavior in concluding that Clark had not proven insanity by a preponderance of the evidence.

**¶30** "The rule is not what we would do if we were deciding the case, but whether or not we can say that the trial judge abused [his] discretion in reaching the conclusions [he] did." *Zmich*, 160 Ariz. at 111, 770 P.2d at 779 (citations omitted). Based on the evidence, we find no abuse of discretion in the trial court's determination that Clark did not prove by clear and convincing evidence that he was insane pursuant to A.R.S. § 13-502(A) at the time of the crime.

(3) *Constitutionality of A.R.S. § 23-502(A)*

**¶31** At the beginning of the insanity phase of the trial, the trial court asked trial counsel to submit memoranda on the status of Arizona law regarding insanity so that it could "have a clear understanding of your relative positions" before the experts testified. In his memorandum, defense counsel argued that § 13-502(A) was unconstitutional because (1) it did not allow him to present a "complete defense" under the *M'Naghten*[9] test for insanity to show that he could not appreciate the nature and quality of his acts; (2) it violated his due process by requiring him to prove insanity by clear and convincing evidence; and (3) it shifted the burden of proof to Clark on the specific

[9] The *M'Naghten* two-prong test for legal insanity provided that a person was not responsible for his criminal conduct by reason of insanity if at the time of the criminal conduct (1) the person was suffering from such a mental disease or defect as not to know the nature and quality of the act, or (2) if such a person did not know that what he was doing was wrong. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997).

element of intent.[10] The prosecutor's memorandum focused on our supreme court's decisions in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), and *State v. Casey*, 205 Ariz. 359, 71 P.3d 351 (2003), and the fact that "diminished capacity" is not a recognized defense in Arizona. The trial court concluded that it was bound by *Mott*, but nonetheless permitted Clark to present evidence concerning his ability to form the necessary intent to commit the crime.

**¶32** At the end of his case, Clark moved again for a directed verdict, relying on his previous Rule 20 arguments "but now in consideration of all the evidence that's been presented." The trial court denied the motion.

**¶33** After trial, Clark moved to vacate his conviction, arguing that: (1) the insanity statute violated due process; (2) the court's failure to consider whether, due to his illness, he was unable to form the necessary *mens rea* to commit the offense deprived him of his fundamental right to present a defense; and (3) requiring him to prove insanity by clear and convincing evidence violated his due process rights and his right to equal protection.

**¶34** He renews these arguments on appeal. We find them to be without merit.

**¶35** We review a challenge to a statute's constitutionality *de novo* as a matter of law. *Casey*, 205 Ariz. at 362, ¶ 8, 71 P.3d at 354. "Statutes are presumed constitutional and the burden of proof is on the opponent of a statute to show that it infringes upon a constitutional guarantee or

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[10] Defense counsel's memorandum noted that because it was preserving these arguments for the record, it did not request the State to respond.

violates a constitutional principle." *Id.* at ¶ 11 (quoting *State v. Wagstaff,* 164 Ariz. 485, 494, 794 P.2d 118, 127 (1990)).

(a) *Due Process Violation*

**¶36** Clark argues that A.R.S. § 13-502(A) violates due process because it does not incorporate the first prong of the *M'Naghten* insanity test, which would also permit him to establish that his mental disease or defect was such that it precluded him from knowing "the nature and quality of the act" he committed.

**¶37** First, while the due process clause affords an incompetent defendant the right not to be tried, there is no constitutional requirement that a state recognize an insanity defense. *Medina v. California,* 505 U.S. 437, 449 (1992) (citing *Powell v. Texas,* 392 U.S. 514, 536-37 (1968)). Second, consistent with the general rule that both crimes and defenses are matters of state law, the United State's Supreme Court has recognized that individual states are free to recognize and define the insanity defense as they see fit. *Patterson v. New York,* 432 U.S. 197, 201-02 (1977). Clark therefore fails to prove how eliminating the first prong of the *M'Naghten* test establishes a violation of due process under either the Arizona or United States Constitutions.[11]

**¶38** Moreover, as the Supreme Court has noted, the *M'Naghten* test for insanity turns on the finding of "criminal irresponsibility" at the time of the criminal offense.

[11] "The federal and state due process clauses contain nearly identical language and protect the same interests." *Casey,* 205 Ariz. at 362, ¶ 11, 71 P.3d at 354.

*Foucha v. Louisiana,* 504 U.S. 71, 97-99 (1992). It is difficult to imagine that a defendant who did not appreciate the "nature and quality" of the act he committed would reasonably be able to perceive that the act was "wrong." Therefore, we do not find that the language would add significantly to the test available in the statute. *See also State v. Chavez,* 143 Ariz. 238, 239, 693 P.2d 893, 894 (1984) (holding that jury instruction that erroneously omitted the language of the first prong of the *M'Naghten* test was not error because if the jury believed defendant did not know the nature of his acts it could not have found that he did not know their probable results).

(b) *Equal Protection Violation*

**¶39** Clark also contends that A.R.S. § 13-502(A) violates his equal protection rights by requiring him to prove insanity by "clear and convincing evidence" when other affirmative defenses may be proven by a "preponderance of the evidence." *See* A.R.S. § 13-205(A).[12] This argument fails as well.

**¶40** "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans,* 517 U.S. 620, 631 (1996) (citations omitted). "[I]f a law neither burdens a fundamental right nor targets a

[12] This section provides: "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title."

suspect class," reviewing courts will uphold the legislative classification as long as it bears a "rational relation to some legitimate [state] end." *Id.*

**¶41** As we note above, the statutory provision concerning the insanity defense does not burden a fundamental constitutional right. *Medina,* 505 U.S. at 452-53; *see also State v. Bethel*, 66 P.3d 840, 841-44, 851 (Kan. 2003) (affirmative defense is creature of 19th Century and not so ingrained in legal system as to constitute fundamental principle of law).Nor does Clark establish that defendants who propound an insanity defense are a suspect class. Therefore, Clark is not entitled to a strict scrutiny analysis.

**¶42** Because insanity is an affirmative defense rather than an element of the crime, the Legislature may allocate to Clark the burden of proving it. *Cf. State v. Farley*, 199 Ariz. 542, 545, ¶ 14, 19 P.3d 1258, 1261 (App. 2001) (may allocate to defendant the burden of proving justification defense). The state has a rational interest in holding citizens responsible for their criminal conduct. Placing a higher burden on those who claim they are completely not responsible for their criminal conduct is a rational means of accomplishing that end. *See also State v. King,* 158 Ariz. 419, 421, 763 P.2d 239, 241 (1988) (rejecting due process and equal protection challenges to insanity statute).

(c) *Ability to Form Mens Rea*

**¶43** Clark argues that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder. However, the record shows that the trial court did not prevent Clark from presenting such

evidence, despite our supreme court's decision to the contrary in *Mott,* even going so far as to permit him to make an offer of proof on the issue at the close of the evidence.[13]

**¶44** Aside from the evidence offered to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer. Even assuming such evidence was sufficient, the trial court was bound by the supreme court's decision in *Mott,* which held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime."[14] 187 Ariz. at 541, 931 P.2d at 1051. Even assuming we agree with the dissent in *Mott,* we do not have the ability to disregard it as the controlling law in Arizona. *State v. Long,* 207 Ariz. 140, 145, ¶ 23, 83 P.3d 618, 623 (App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.").

**¶45** Clark acknowledges that we are without authority to overrule *Mott,* but nonetheless argues that it was

---

[13] The *mens rea* requirement for this crime was defined statutorily. A.R.S. § 13-1105(a)(3) ("A person commits first degree murder if . . . intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.").

[14] *State v. McKeon,* 201 Ariz. 571, 38 P.3d 1236 (App. 2002), on which Clark relies, dealt with the issue of involuntary intoxication from the non-abusive use of prescription medications. It also acknowledges that *Mott* still controls on the insanity defense. *Id.* at 575, 120 n.2, 38 P.3d at 1240 n.2.

wrongly decided and should be overruled.[15] *See State v. Foster,* 199 Ariz. 39, 41, ¶ 9 n.1, 13 P.3d 781, 783 n.1 (App. 2000). We do not consider those arguments.

(4) Sentence Violates Eighth Amendment

**¶46** Finally, Clark maintains that his sentence to life without the possibility of release until he has served a minimum of twenty-five calendar years is disproportionate and violates the Eighth Amendment prohibition against cruel and unusual punishment. We find that it does not.

**¶47** We review *de novo* whether a penalty is unconstitutionally disproportionate to the crime. *See, e.g., In re One Residence at 319 E. Fairgrounds Dr.,* 205 Ariz. 403, 409, ¶ 20, 71 P.3d 930, 936 (App. 2003) (reviewing proportionality of punitive forfeiture). The proportionality analysis of a sentence requires us to compare the "gravity of the offense, understood to include not only the injury caused, but also the defendant's culpability, with the harshness of the penalty." *State v. Davolt,* 207 Ariz. 191, 215, ¶ 102, 84 P.3d 456, 480 (2004) (citations and quotations omitted). The mandatory nature of a sentence does not render it disproportionate. *State v. Jonas,* 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990).

**¶48** The first step in a proportionality analysis is to determine if an inference of gross disproportionality between Clark's crime and his sentence can be drawn. *State v. Davis,* 206 Ariz. 377, 384, ¶ 35, 79 P.3d 64, 71 (2003). Even given Clark's mental condition, we find in

[15] He raises the issue for the purpose of preserving it for further appellate review.

this case that it cannot. A life sentence with the possibility of release after 25 years is simply not disproportionate to the crime of first degree murder. *See, e.g., Ewing v. California,* 533 U.S. 11, 20-31 (2003) (twenty-five year sentence for stealing ~~gold~~ golf clubs under "three strikes law" not constitutionally disproportionate sentence).

## CONCLUSION

**¶49** For the foregoing reasons, we affirm Clark's conviction and sentence.

/s/ G. Murray Snow
G. Murray Snow, Judge

CONCURRING:

/s/ Pat K. Norris
Patricia K. Norris, Presiding Judge

/s/ Patrick Irvine
Patrick Irvine, Judge

[LOGO]

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May 25, 2005

RE: **STATE OF ARIZONA v ERIC MICHAEL CLARK**
Arizona Supreme Court No. CR-05-0047-PR
Court of Appeals, Division One, Nos. 1 CA-CR 03-0851 and 1 CA-CR 03-0985 (Consolidated)
Coconino County Superior Court No. CR 2000-0538

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 24, 2005, in regard to the above-referenced cause:

**ORDERED: Appellant's Petition for Review = DENIED.**

(9)

Supreme Court, U.S.
FILED
MAR 6 - 2006
OFFICE OF THE CLERK

No. 05-5966

# In the Supreme Court of the United States

ERIC MICHAEL CLARK, PETITIONER

*v.*

STATE OF ARIZONA

*ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the States to adopt the insanity defense formulated in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).

2. Whether the Due Process Clause permits a State to preclude consideration of mental illness in assessing *mens rea* and instead to channel consideration of that evidence into the insanity determination.

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## INTEREST OF THE UNITED STATES

This case presents two questions: (1) whether due process requires the States to define insanity using the two-part *M'Naghten* test; and (2) whether a State may constitutionally confine consideration of mental illness to resolution of the insanity defense and preclude its consideration in assessing *mens rea*. Although Congress has enacted *M'Naghten* as the test of insanity in the federal courts, 18 U.S.C. 17(a), the federal insanity standard has varied over the years, and the United States has an interest in ensuring that Congress retains authority to revise the standard. In addition, several federal courts of appeals have interpreted Section 17(a) to prohibit a defendant from using evidence of mental illness to establish that he lacked the capacity to form the mental state required for the offense. The decision in this case may determine the constitutionality of that prohibition. The United States therefore has a substantial interest in this case.

## STATEMENT

1. During the early morning hours of June 21, 2000, petitioner, armed with a .22 caliber handgun, repeatedly circled his neighborhood in a pickup truck while blaring loud music. Neighbors called the police, and Flagstaff Police Officer Jeffrey Moritz drove to the scene. Petitioner pulled over in response to the police siren and lights. Moments later, several shots were fired. Petitioner abandoned his truck and fled. Officer Moritz's body was found lying behind his police car. Petitioner was arrested that evening. J.A. 338-339.

Petitioner was charged with violating Arizona Revised Statutes Annotated § 13-1105(A)(3) (West 2001), which states that a "person commits first degree murder if * * * intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty." Petitioner waived his right to a jury trial and gave notice that he would

assert a defense of "guilty except insane" under Arizona Revised Statutes Annotated § 13-502 (West 2001). J.A. 340. That provision states that "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Ariz. Rev. Stat. Ann. § 13-502(A) (West 2001).

At trial, the State introduced evidence that petitioner knew that Moritz was a police officer and intended to kill him. That evidence included testimony that, on two occasions before the shooting, petitioner had stated that he was angry with the police, that he "wanted to show them," and that he would "shoot[] them in the head" after he lured them from their cars. J.A. 337-338. The State also argued that petitioner, consistent with his earlier threats, intentionally goaded the police into a confrontation by driving repeatedly around the neighborhood playing loud music. J.A. 315.

Petitioner sought to present a diminished capacity defense: he claimed that the court could find him guilty of a less serious form of homicide if it rejected his insanity defense but concluded that his mental illness prevented him from forming the specific intent required for first-degree murder. 8/5/03 Tr. 18; Br. in Opp. App. B. The trial court concluded that, under *State* v. *Mott*, 931 P.2d 1046 (Ariz.), cert. denied, 520 U.S. 1234 (1997), it could not consider evidence of petitioner's mental illness on the issue of "form and [sic] intent and [petitioner's] capacity for the intent." J.A. 9. The court noted, however, that the same evidence was relevant to petitioner's insanity defense, so the court permitted petitioner to present it. *Ibid.* The court told petitioner that he could "make an offer of proof as to the intent" at the conclusion of the case to preserve the issue for appeal. *Ibid.* Petitioner did not make an offer of proof, and the court issued no further rulings on the admissibility of mental illness evidence.

After the presentation of evidence on petitioner's insanity defense, the trial court entered a two-part special verdict. The court found that (1) petitioner shot and caused the death of Moritz; and (2) petitioner's perceptions of reality were not so severely distorted that "he did not know his actions were wrong." J.A. 332-334. Petitioner moved to vacate the judgment and sentence, arguing that Arizona's definition of insanity and its rule prohibiting consideration of mental illness to determine whether he "was unable to form the *mens rea* necessary to commit an intentional or knowing murder" both violate due process. Br. in Opp. App. G at 1. The court denied petitioner's motion. 11/21/03 Order.

2. The Arizona Court of Appeals affirmed petitioner's conviction. J.A. 336-354. As relevant here, the court rejected petitioner's argument that Arizona's insanity defense violates due process because it does not include the first component of the *M'Naghten* test, which provides that a defendant is insane if he did not know "the nature and quality of the act" he committed. J.A. 349. The court reasoned that there is no constitutional right to an insanity defense, much less to a specific test of insanity. The court also concluded that the first part of the *M'Naghten* test does not add anything meaningful to Arizona's test, under which a defendant is insane if he did not know that his act was wrong. J.A. 349-350.

The appeals court also rejected petitioner's claim that he was denied the due process right to present a defense by the trial court's "failure to consider whether, due to his illness, he was unable to form the necessary *mens rea* to commit the offense." J.A. 348. The appeals court noted that the trial court "did not prevent [petitioner] from presenting" mental health evidence and allowed him to make an offer of proof on the issue. J.A. 351-352. The court also observed that, "[a]side from the evidence offered to prove his insanity generally," petitioner specified no evidence demonstrating "that he was

not capable of knowing he was killing a police officer." J.A. 352. In any event, the court concluded, the trial court was bound by *Mott*, which held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *Ibid.* (quoting *Mott*, 931 P.2d at 1051).

3. The Arizona Supreme Court denied petitioner's petition for review. Pet. App. B at 1.

## SUMMARY OF ARGUMENT

Arizona has chosen to channel consideration of a defendant's mental illness into an insanity determination that turns on whether the defendant knew that his conduct was wrong. Due process does not prohibit the State from making that policy choice.

I. No fundamental principle of justice requires the States to adhere strictly to the two-part test for insanity in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843). States have broad leeway in defining crimes and affirmative defenses. Therefore, as this Court's cases make clear, the Constitution does not require the adoption of any particular insanity test. *Leland* v. *Oregon*, 343 U.S. 790, 800-801 (1952); *Powell* v. *Texas*, 392 U.S. 514, 535-536 (1968).

Imposing one particular form of the insanity defense on the States would disregard their traditional role in balancing the complex and competing considerations that bear on the role of mental illness in excusing criminal liability. Moreover, the proposition that the *M'Naghten* test is fundamental cannot be squared with the wide variation in the insanity tests used both throughout history and today. In any event, Arizona's test incorporates the essence of the *M'Naghten* test—the inquiry into whether the defendant knew his conduct was wrong. Arizona's test is therefore constitutional even if due process requires the States to adopt some form of the *M'Naghten* test.

II. The Constitution also permits the States to confine consideration of mental illness to the insanity determination and to preclude its consideration in assessing whether the defendant had the *mens rea* required for the offense. Just as a State would be free to dispense with an insanity defense and consider mental illness only in determining whether the defendant committed the underlying offense, a State is also free to channel mental illness evidence into a particular form of the insanity defense. This Court has upheld laws precluding consideration of mental illness evidence in assessing *mens rea* in three separate cases. And both historically and today, a substantial number of States have imposed significant restrictions on the use of mental illness evidence to assess *mens rea*. The federal courts of appeals and state courts have repeatedly upheld those restrictions against due process challenges.

There are several valid reasons for a State to preclude consideration of mental illness in assessing *mens rea*. A State could reasonably conclude that psychiatric evidence sheds insufficient light on a defendant's state of mind at the time of the offense and presents too high a risk of erroneous acquittals. A State could also decide that allowing mental illness to negate *mens rea* would undermine the State's policy judgments in fashioning the insanity defense because defendants could escape liability without meeting the requirements of the defense. And a State could determine that limiting consideration of mental illness to the insanity defense better protects society because it ensures that mentally ill individuals who commit crimes are confined for treatment rather than released. Those considerations amply support Arizona's decision to channel psychiatric evidence into the insanity defense.

## ARGUMENT

Arizona provides a defense of "guilty except insane" when a person commits an offense while "afflicted with a mental disease or defect of such severity that the person did not

know the criminal act was wrong." Ariz. Rev. Stat. Ann. § 13-502(A) (West 2001). The defendant bears the burden of proving the defense by clear and convincing evidence. *Id.* § 13-502(C). A defendant who is found "guilty except insane" is committed to a mental health facility instead of prison. *Id.* § 13-502(D).

Arizona does not, however, excuse criminal liability based on diminished mental capacity that does not meet the standard for legal insanity. It therefore "does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *Mott*, 931 P.2d at 1051. Permitting use of the evidence for either purpose, the Arizona Supreme Court has held, would undermine the legislature's decision to reject a diminished capacity defense. *Ibid.* Thus, Arizona restricts evidence of mental illness to the insanity determination and precludes its consideration in determining whether the defendant is guilty of the underlying offense.

Arizona's approach to mental illness is well within the broad leeway that the Constitution affords the States in administering criminal justice. Due process permits the States to determine when mental illness will excuse criminal responsibility and how mental illness will be considered—whether as an affirmative defense, in assessing *mens rea*, or both.

## I. DUE PROCESS DOES NOT REQUIRE THE STATES TO ADOPT THE *M'NAGHTEN* INSANITY DEFENSE

### A. The States Have Broad Discretion In Defining Crimes And Affirmative Defenses

This Court has repeatedly recognized that "[p]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . [the Court] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual

States." *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) (quoting *Patterson* v. *New York*, 432 U.S. 197, 201 (1977)). States therefore enjoy wide latitude in defining crimes and affirmative defenses, as well as in establishing the procedures by which those crimes and defenses are proved. *Id.* at 58 (Ginsburg, J., concurring in the judgment). States have especially broad discretion when "determining 'the extent to which moral culpability should be a prerequisite to conviction of a crime.'" *Ibid.* (quoting *Powell*, 392 U.S. at 545 (Black, J., concurring)).

The Court has applied those principles in various contexts. For example, in *Patterson*, the Court held that due process permitted New York to exclude "malice aforethought" as an element of murder and to require defendants to prove the defense of "extreme emotional disturbance." 432 U.S. at 201. In *Martin* v. *Ohio*, 480 U.S. 228 (1987), the Court upheld a law that made "self-defense" an affirmative defense rather than an element of the prosecution's case.

The principles reflected in those cases establish that Arizona's insanity defense does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (citations omitted); *Egelhoff*, 518 U.S. at 43 (plurality opinion). Petitioner argues that the Arizona defense offends a "fundamental" principle because it does not track the two components of the insanity test enunciated in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).[1] But that contention cannot be reconciled with this Court's cases, the States' traditional responsibility for deciding when mental

[1] The *M'Naghten* test provides that "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep. at 722.

illness excuses criminal liability, or history and contemporary experience.

### B. Precedent Establishes That The Constitution Does Not Require Any Particular Form Of Insanity Defense

The Court has never held that a defendant has a constitutional right to present an affirmative insanity defense. In fact, the Court has suggested that there is no such right. See *Medina* v. *California*, 505 U.S. 437, 449 (1992). Individual Justices have echoed that suggestion. See *Foucha* v. *Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring) (The Court's holding "does not indicate that States must make the insanity defense available."); *id.* at 96 (Kennedy, J., dissenting) ("[T]he States are free to recognize and define the insanity defense as they see fit."); *Ake* v. *Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting) ("It is highly doubtful that due process requires a State to make available an insanity defense.").

The Court has also repeatedly rejected claims that the Constitution requires the States to adopt a particular form of the insanity defense. In *Leland* v. *Oregon*, 343 U.S. 790, 800-801 (1952), the Court held that due process did not require Oregon to adopt the "irresistible impulse" test of insanity in lieu of the *M'Naghten* test. The Court explained that "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Id.* at 801. Justice Frankfurter, dissenting on another issue, noted that "it would be indefensible to impose upon the States * * * one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test." *Id.* at 803.

The Court reiterated that view in *Powell*, which rejected a constitutional challenge to a law criminalizing public drunkenness. The plurality opinion stated that "[n]othing could be

less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." 392 U.S. at 536. It explained that it has always been "the province of the States" to set the standards for "assess[ing] the moral accountability of an individual for his antisocial deeds," and those standards have evolved over time. *Id.* at 535-536. Justices Black and Harlan noted that *Leland* had already established "the indefensibility of imposing on the States any particular test of criminal responsibility." *Id.* at 545 (concurring opinion).[2]

### C. Imposing The *M'Naghten* Test On The States Would Disregard Their Traditional Responsibility For Deciding When Mental Illness Excuses Criminal Liability

The Court's refusal to constitutionalize any particular form of the insanity defense respects the States' longstanding and well-established authority to determine the circumstances in which mental illness excuses criminal liability. That determination involves complex and competing policy considerations about moral culpability, societal protection, and medical science. Society's judgments on those issues have evolved over time and continue to evolve. As the plurality explained in *Powell*, "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the na-

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[2] Petitioner incorrectly contends (Br. 40 n.43) that this Court "embraced" *M'Naghten* in *Hotema* v. *United States*, 186 U.S. 413 (1902), and *Davis* v. *United States*, 165 U.S. 373 (1897). In *Hotema*, the Court approved the jury charge on insanity, which included tests based on both *M'Naghten* and the irresistible impulse theory. See 186 U.S. at 416-417, 420. In *Davis*, the Court rejected a claim that the jury charge did not adequately convey the *M'Naghten* test. 165 U.S. at 378. Neither case suggests that *M'Naghten* is constitutionally mandated. See *United States* v. *Freeman*, 357 F.2d 606, 613 (2d Cir. 1966); *Campbell* v. *United States*, 307 F.2d 597, 601 n.4 (D.C. Cir. 1962)).

ture of man." 392 U.S. at 536. Allowing the several States to make that adjustment permits "fruitful experimentation" and continued evolution. *Id.* at 536-537. The Due Process Clause provides little in the way of tools to superintend that experimentation and evolution. And it certainly provides no basis to adopt *M'Naghten* as a uniform standard and thereby freeze "into a rigid constitutional mold" the balance struck by the House of Lords more than 150 years ago. *Id.* at 537.

That would be particularly inadvisable because psychiatric knowledge continues to evolve. See *Leland*, 343 U.S. at 800; *id.* at 803 (Frankfurter, J., dissenting). "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983). Even if this Court had the authority to strike the balance for the States among competing theories of moral accountability, medical understanding of the relationship between mental disease and criminal conduct is not sufficiently developed to justify a fixed constitutional definition of insanity.

### D. History And Contemporary Experience Confirm That The *M'Naghten* Test Is Not Constitutionally Required

Constitutionalizing *M'Naghten* is also unwarranted because it has not had "the uniform and continuing acceptance we would expect for a rule that enjoys 'fundamental principle' status." *Egelhoff*, 518 U.S. at 48 (plurality opinion).

Until the early nineteenth century, the English courts used various formulations of the insanity defense, including the "right and wrong" test eventually articulated in *M'Naghten*, the "wild beast" test requiring a total deprivation of understanding and memory, and the "irresistible impulse" test under which a defendant is excused if his mental impairment made him unable to control his conduct. See Henry Weihofen, *Insanity as a Defense in Criminal Law* 20-24 (1933); *e.g.*,

*Regina* v. *Oxford*, 173 Eng. Rep. 941, 950 (1840) (using both the right and wrong test and the irresistible impulse test); *Rex* v. *Arnold*, 16 How. St. Tr. 695, 764-765 (Ct. Common Pleas 1724) (using the wild beast test). There was thus clearly no consensus on any particular form of the insanity defense at the time of the framing.

The first case in the United States that cited the *M'Naghten* test also referenced the irresistible impulse test. *Commonwealth* v. *Rogers*, 48 Mass. 500, 502 (1844). The irresistible impulse test gained increasing popularity during the nineteenth century. See Donald H.J. Hermann, *The Insanity Defense: Philosophical, Historical and Legal Perspectives* 38 (1983). Meanwhile, in 1870, New Hampshire rejected *M'Naghten* and adopted the "product" test under which a defendant is excused if his crime "was the offspring or product of mental disease." *State* v. *Pike*, 49 N.H. 399, 442 (1870).[3]

By the time Congress codified *M'Naghten* in 1984, 18 U.S.C. 17(a), all the federal courts of appeals (and many

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[3] Petitioner argues (Br. 37-39, 41) that the other definitions of insanity incorporate *M'Naghten*, so it is consistent with historical practice to adopt *M'Naghten* as the constitutional minimum. That is incorrect. The different insanity tests embody *competing* visions of when mental illness excuses criminal liability. Moreover, the other tests do not all subsume *M'Naghten*. For example, four States have abolished the affirmative defense of insanity and take mental illness into account only in assessing *mens rea*. See p. 13, *infra*. In those States, if a defendant had the mental state required for the crime, it is no excuse that he did not know that his conduct was wrong. In addition, at certain times, some jurisdictions have followed only the irresistible impulse test, without coupling it with *M'Naghten*. See Abraham S. Goldstein, *The Insanity Defense* 67 (1967); cf. *United States* v. *Currens*, 290 F.2d 751, 774 (3d Cir. 1961) (adopting only the volitional component of the American Law Institute test discussed at pp. 12-13, *infra*). Plainly, someone may be capable of controlling his conduct and thus be criminally liable under the irresistible impulse test, yet not know that his conduct is wrong and therefore be excused from liability under *M'Naghten*. Conversely, someone can know his conduct is wrong and thus be liable under *M'Naghten*, yet be unable to control his conduct and therefore be excused under the irresistible impulse test.

States) had abandoned that test in its traditional form. See *United States* v. *Brawner*, 471 F.2d 969, 979-981 (D.C. Cir. 1972) (en banc); Lisa Callahan et al., *Insanity Defense Reform in the United States—Post-Hinckley*, 11 Mental and Physical Disability L. Rep. 54 (1987); see also *Carter* v. *United States*, 325 F.2d 697, 707 (5th Cir. 1963) (Bell, J., dissenting) ("It is absurd to keep talking about McNaghten. McNaghten is dead."), cert. denied, 377 U.S. 946 (1964).

There is still significant variation in the insanity tests in use today. Most States and the federal government follow some form of *M'Naghten*. See Wayne R. LaFave, *Substantive Criminal Law* § 7.2, at 527 (2d ed. 2003). But at least eleven States omit the first component of the test—whether the defendant "knew the nature and quality of the act." *M'Naghten*, 8 Eng. Rep. at 722. See LaFave § 7.2(a), at 527-528 n.7.[1] A substantial number of jurisdictions use some form of the American Law Institute (ALI) test, under which a defendant is excused from liability if "as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." ALI, Model Penal Code § 4.01(1), at 163 (1985). See LaFave § 7.5(b), at 560. A few

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[1] See Ariz. Rev. Stat. Ann. § 13-502(A) (West 2001); Colo. Rev. Stat. Ann. § 16-8-101.5(1) (2004); Del. Code Ann. tit. 11, § 401(a) (2001); 720 Ill. Comp. Stat. Ann. 5/6-2(a) (West 2002); Ind. Code Ann. § 35-41-3-6(a) (Michie 2004); La. Rev. Stat. Ann. § 14:14 (West 1997); Me. Rev. Stat. Ann. tit. 17-A, § 39.1 (West 1983); Ohio Rev. Code Ann. § 2901.01(A)(14) (Anderson 2003); S.C. Code Ann. § 17-24-10(A) (Law Co-op. 2003); S.D. Codified Laws § 22-1-2(20) (West 2004); Tex. Penal Code Ann. § 8.01(a) (West 2003). Oklahoma's statutory insanity test does not include "nature and quality" language, Okla. Stat. Ann. tit. 21, § 152(4) (West 2002), but Oklahoma courts have interpreted the statute to include both components of *M'Naghten*. See *Cheney* v. *State*, 909 P.2d 74, 90 (Okla. Crim. App. 1995). Some of these States could be categorized as adopting only the wrongfulness component of the American Law Institute test rather than the wrongfulness component of *M'Naghten*. See Pet. Br. 38. But the critical point is that none of them utilizes "nature and quality" language.

States follow *M'Naghten* as supplemented by the irresistible impulse test or the second part of the ALI test. See LaFave § 7.3(a), at 545 n.1; Mich. Comp. Laws Ann. § 768.21a (West 2000). One of those States does not include the "nature and quality" language of *M'Naghten*. Ga. Code Ann. § 16-3-2 (2003). New Hampshire continues to use the "product" approach. See *State* v. *Cegelis*, 638 A.2d 783 (N.H. 1994). And four States have abolished the insanity defense altogether and instead consider mental illness in assessing *mens rea*. See *State* v. *Bethel*, 66 P.3d 840 (Kan.), cert. denied, 540 U.S. 1006 (2003); *State* v. *Herrera*, 895 P.2d 359 (Utah 1995); *State* v. *Searcy*, 798 P.2d 914 (Idaho 1990); *State* v. *Korell*, 690 P.2d 992 (Mont. 1984).[5]

Not only has there been wide variation in the tests used to establish insanity, but the insanity defense has always been highly controversial. See *Leland*, 343 U.S. at 801; American Ass'n on Mental Retardation Amicus Br. 4 & nn.6-7. The idea of eliminating insanity as an affirmative defense and considering mental illness only in assessing *mens rea* has been advanced by commentators and considered by legislatures for at least a century.[6] And the *M'Naghten* test has been widely criticized from its inception. See LaFave § 7.2(b), at 540; Abraham S. Goldstein, *The Insanity Defense* 80 (1967).

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[5] Nevada also attempted to abolish the insanity defense, but its Supreme Court held the abolition unconstitutional. See *Finger* v. *State*, 27 P.3d 66 (Nev. 2001), cert. denied, 534 U.S. 1127 (2002).

[6] See Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535, 536 (1917); Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477, 499, 510 (1982). Members of Congress and the Department of Justice advocated the *mens rea* approach during the efforts to reform the insanity defense following the acquittal of John Hinckley for the attempted assassination of President Reagan. See *United States* v. *Pohlot*, 827 F.2d 889, 899 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988).

Thus, there is no "settled tradition" restricting how States define the insanity defense. *Medina*, 505 U.S. at 446. On the contrary, the wide variation in insanity tests currently and over time, as well the controversy surrounding the defense, establish that no one approach to insanity can be viewed as "fundamental." See *Egelhoff*, 518 U.S. at 48 (plurality opinion) (rule is not "fundamental" when "one-fifth of the States either never adopted [it] or have recently abandoned it").

**E. Arizona's Insanity Defense Would Be Constitutional Even If The Constitution Required The *M'Naghten* Test**

Even if the *M'Naghten* test were constitutionally mandated, petitioner's claim that the Arizona test violates due process because it modifies the traditional test would lack merit. The wording used to articulate the *M'Naghten* test has not been uniform. See Weihofen 32. As noted above, a dozen or more States omit the "nature and quality of the act" language in phrasing their *M'Naghten*-based tests. See pp. 12-13, *supra*. Moreover, the wrongfulness component of the ALI test, used by a substantial number of States, also does not contain language requiring that the defendant have understood the "nature and quality" of his acts. See ALI § 4.01(1), at 163. And both the American Bar Association (ABA) and the American Psychiatric Association (APA) have endorsed standards that use only wrongfulness language. See APA Amicus Br. 28; ABA, Criminal Justice Mental Health Standards § 7-6.1, at 330 (1989).

Many States and model standards omit the "nature and quality" language because it adds nothing to the inquiry into whether the defendant knew that his criminal act was wrong. See Weihofen 37. The "nature and quality of the act" means the physical characteristics of the act and its harmfulness. That part of the *M'Naghten* test thus asks whether the defendant was aware of his actions and their consequences. See Goldstein 50 & n.16; *State* v. *Brosie*, 553 P.2d 1203, 1205 (Ariz.

1976). But that inquiry is subsumed by the "right and wrong" inquiry. As explained in *M'Naghten* itself, the defendant's "knowledge of right and wrong" is evaluated not "in the abstract" but "in respect to the very act with which he is charged." 8 Eng. Rep. at 723. It is therefore impossible for a defendant to have known that his actions were wrong unless he understood their nature and quality. See *People* v. *Skinner*, 704 P.2d 752, 760 (Cal. 1985); Goldstein 50.

Courts also have treated the right and wrong inquiry as subsuming the "nature and quality" inquiry. See Goldstein 50. Opinions from this Court have repeatedly described the *M'Naghten* test using only the "right and wrong" language. See, *e.g.*, *Powell*, 392 U.S. at 536 (plurality opinion) ("the right-wrong test of *M'Naghten's Case*"); *Leland*, 343 U.S. at 800 ("Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions."); *Fisher* v. *United States*, 328 U.S. 463, 466 (1946) (defendant was "sane in the usual legal sense" because "[h]e knew right from wrong"); see also *Foucha*, 504 U.S. at 97 (Kennedy, J., dissenting) (stating that Louisiana provided a "traditional statement" of the *M'Naghten* test in a statute containing only the "right and wrong" test). State courts also frequently treat "knowledge of 'the nature and quality of the act'" as "the mere equivalent of the ability to know that the act was wrong." LaFave § 7.2(b), at 536; see Weihofen 37. "The phrase 'nature and quality of the act' is sometimes omitted completely from the charge to the jury. More often, it is either stated to the jury without explanation or treated as adding nothing to the requirement that the accused know his act was wrong." Goldstein 50.

The Arizona Court of Appeals in this very case recognized that the wrongfulness inquiry subsumes the nature and quality inquiry. J.A. 350 ("It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act

he committed would reasonably be able to perceive that the act was 'wrong.'"). The trial court also understood the wrongfulness inquiry to encompass whether petitioner understood the nature and quality of his acts. See J.A. 333-334 (relying on a finding that petitioner "was aware that Officer Moritz was a police officer" in concluding that petitioner's mental illness did not "distort his perception of reality so severely that he did not know his actions were wrong").[7]

There is thus no practical, let alone constitutional, difference between the traditional two-part *M'Naghten* test and Arizona's insanity test. Under those circumstances, even if there were authority and cause for this Court to unsettle practices in the States by imposing a single test for insanity modeled on *M'Naghten*, petitioner could not show that his due process rights were violated.

## II. DUE PROCESS PERMITS A STATE TO CHANNEL EVIDENCE OF MENTAL ILLNESS INTO THE INSANITY DETERMINATION

### A. A State's Decision To Consider Mental Illness Only In Determining Insanity Is Valid Whether Expressed As A Redefinition Of The Offense Or As An Evidentiary Rule

If a State recognizes a particular form of the insanity defense, the Constitution permits the State to limit consideration of mental illness to the resolution of that defense and to preclude its consideration in determining whether the State has proved the elements of the offense. A State can accomplish that goal in two ways. It can effectively redefine the elements of its offenses by declaring mental illness evidence irrelevant to the *mens rea* determination, or it can establish

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[7] Petitioner's contention (Br. 47) that an "unawareness of the nature of his acts could coexist in [his] mind" with knowledge of the "wrongness of killing" is beside the point. The *M'Naghten* inquiry is not whether petitioner knew that "killing" is wrong "in the abstract" but whether petitioner understood the wrongfulness of "the very act" he committed. *M'Naghten*, 8 Eng. Rep. at 723.

an evidentiary rule treating that evidence as inadmissible. Cf. *Egelhoff*, 518 U.S. at 50 n.4 (plurality opinion) (law prohibiting use of voluntary intoxication to negate *mens rea* may be justified either as a redefinition of the offense or as an evidentiary rule); *id.* at 58 (Ginsburg, J., concurring in the judgment) (upholding law as a redefinition of the offense that renders evidence of voluntary intoxication irrelevant to the *mens rea* element).

Arizona appears to have chosen the redefinition approach. See *Mott*, 931 P.2d at 1050-1051 (explaining that the rule on mental health evidence is a necessary component of the legislature's rejection of the diminished capacity defense). Thus, in a prosecution for first-degree murder, the State does not have to prove that the defendant "intend[ed] or kn[ew] that [his] conduct w[ould] cause death to a law enforcement officer" in a purely subjective sense. Ariz. Rev. Stat. Ann. § 13-1105(A)(3) (West 2001). Instead, the State has to prove only that (1) he caused the death with actual knowledge or intent, or (2) he killed under circumstances that would otherwise establish knowledge or intent but for his mental illness. Cf. *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring in the judgment). This definition leaves to the insanity-defense stage the consideration of the mitigating effect (if any) of mental illness. In so doing, the definition prevents mental illness evidence from being used to dispute *mens rea* in a manner that resurrects the diminished capacity defense that the Arizona legislature has rejected. See *Mott*, 931 P.2d at 1051. Alternatively, if Arizona's rule is conceived as a mere evidentiary rule rendering mental illness evidence inadmissible in assessing *mens rea*, while channeling that evidence into the insanity-defense determination, that approach is equally permissible.[5]

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[5] The principal difference between conceptualizing the rule as a redefinition of the offense (*i.e.*, a rule declaring what evidence is *relevant* to the *mens rea* element) rather than a mere rule of evidence (*i.e.*, a rule declaring what

The States possess the same wide latitude to establish evidentiary rules that they have to define the elements of crimes and affirmative defenses. See pp. 6-7, *supra*; *Egelhoff*, 518 U.S. at 43 (plurality opinion); *id.* at 58 (Ginsburg, J., concurring in the judgment); *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules."); *Powell*, 392 U.S. at 535 (plurality opinion) ("[T]his Court has never articulated a general constitutional doctrine of *mens rea*.").

Thus, Arizona's decision to preclude use of mental health evidence in determining *mens rea* and instead to channel that evidence into the insanity determination is constitutional unless it violates a "fundamental principle of justice." *Egelhoff*, 518 U.S. at 43 (plurality opinion); *id.* at 59 (Ginsburg, J., concurring in the judgment). This Court's decisions, history and contemporary practice, and sound policy considerations all indicate that it does not.

### B. This Court's Cases Establish That States May Preclude Consideration Of Mental Illness In Assessing *Mens Rea*

This Court has upheld state laws precluding consideration of mental illness evidence in assessing *mens rea* on three separate occasions. In *Fisher*, the Court upheld the District of Columbia (D.C.) law precluding consideration of the evidence. In two other cases, the Court summarily rejected claims that excluding the evidence violated due process. *Troche* v. *California*, 280 U.S. 524 (1929) (per curiam); *Coleman* v. *California*, 317 U.S. 596 (1942) (per curiam).

The defendant in *Fisher* was convicted of first degree murder, an offense for which "[d]eliberation and premeditation [were] necessary elements." 328 U.S. at 464-465. At trial, Fisher was permitted to introduce evidence of his mental

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evidence is *admissible* to prove the element) is that the former analysis makes clear that petitioner's challenge sounds in substantive due process.

infirmities to support his insanity defense, which proved unsuccessful. But he was denied "an instruction from the trial court which would [have] permit[ted] the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and [his] capacity for premeditation and deliberation." *Id.* at 470. This Court upheld the refusal to give the instruction because it was inconsistent with D.C. law, which did not recognize an excuse of diminished mental capacity short of insanity. See *id.* at 471 (citing *United States* v. *Lee*, 15 D.C. (4 Mackey) 489, 495 (1886)). The Court also refused Fisher's request that it exercise its supervisory power over the D.C. courts to require the requested instruction. See *Fisher*, 328 U.S. at 476-477.

The Court's refusal to exercise its supervisory power demonstrates that it did not view the D.C. law as offending any fundamental principle of justice. Indeed, the Court expressly stated that the preclusion of mental health evidence posed no due process problem. The Court observed that "[t]here was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process." 328 U.S. at 466 (citation omitted); see also *id.* at 476 ("The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern.").

Petitioner attempts (Br. 25) to distinguish *Fisher* on the grounds that it involved only the denial of an instruction affirmatively requiring consideration of mental health evidence and the jury was not told that it could not consider that evi-

dence. It is clear, however, that *Fisher* did not rest on a conclusion that the requested instruction was superfluous. Rather, the decision rested on the fact that instruction was inconsistent with the applicable substantive law, which prohibited reliance on mental health evidence to negate *mens rea*. See *Fisher*, 328 U.S. at 471-477. Indeed, the Court expressly noted that "[t]he jury might not have reached the result it did" if the requested instruction had been given, because the jury "could have determined from the evidence [of mental deficiency] that the homicide was not the result of premeditation and deliberation," *id.* at 467, 470.[9]

*Fisher* was virtually foreordained by the summary decision almost twenty years earlier in *Troche*. The defendant in *Troche* was convicted under California statutes providing for a bifurcated trial when the defendant in a murder case asserted an insanity defense. A trial was first held on guilt, at which the defendant was presumed sane and all evidence tending to establish insanity was inadmissible. The sanity issue was determined in a separate proceeding after the jury found the defendant guilty. See *People* v. *Troche*, 273 P. 767, 769-770 (Cal. 1928). The California Supreme Court ruled that the trial court's exclusion from the guilt trial of "all evidence tending to show the mental condition of the defendant at the time of the commission of the offense" was mandated by the statutory scheme, *id.* at 772, and that the statutes were consistent with due process, *id.* at 770. Troche appealed to this Court, challenging the presumption of sanity and the exclusion of insanity evidence from the guilt proceeding. He argued that those rules "conclusively presum[ed] one of the

[9] Justice Murphy's description of the question presented in his dissent confirms that *Fisher* turned on the validity of D.C.'s rule barring consideration of mental health evidence: "May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder?" 328 U.S. at 491 (Murphy, J., dissenting).

main elements of a crime against the defendant, said element being that of intent." *Muench* v. *Israel*, 715 F.2d 1124, 1138 (7th Cir. 1983) (quoting from appellant's brief in this Court), cert. denied, 467 U.S. 1228 (1984). This Court dismissed for want of a substantial federal question. 280 U.S. at 524.[10]

The Court reached the same result in *Coleman*, which involved a challenge to the same California statutes. Coleman challenged his conviction on the ground that, at the guilt trial, the jury must be allowed to consider "all of the evidence bearing on the mental condition of the defendant at the time of the commission of the crime," including evidence of "mental abnormalities not amounting to a complete defense of legal insanity, but which still may show the lack of capacity to form the specific intent to commit first degree murder." *People* v. *Coleman*, 126 P.2d 349, 353 (Cal. 1942). The California Supreme Court rejected that claim, noting that arguments against excluding the evidence were fundamentally addressed to "the desirability of the legislative policy rather than to the question of deprivation of constitutional rights." *Id.* at 353. Coleman appealed, and this Court summarily dismissed, citing *Troche*. 317 U.S. at 596.

### C. History and Contemporary Practice Confirm That The Constitution Does Not Require Consideration Of Mental Illness Evidence In Assessing *Mens Rea*

The question whether evidence of mental illness can be used to establish that the defendant lacked the necessary *mens rea* did not arise with any frequency until the late nineteenth century. See Henry Weihofen & Winfred Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 Yale L.J.

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[10] That dismissal is a ruling on the merits binding on the lower courts. See *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975). It is also precedent in this Court, although it does not receive "the same deference given a ruling after briefing, argument, and a written opinion." *Caban* v. *Mohammed*, 441 U.S. 380, 390 n.9 (1979).

959, 963-965 (1947).[11] When the issue did gain prominence, States divided almost evenly on the question. See *Fisher*, 328 U.S. at 473 & n.12; Weihofen & Overholser, 56 Yale L.J. at 959. Thus, in the late 1800s and early 1900s, courts in a substantial number of jurisdictions concluded that evidence of diminished mental capacity could not be used to disprove *mens rea*.[12]

The States continue to be divided on the question today. According to the ABA, in 1989, at least 16 States did not permit the use of mental health evidence to negate *mens rea*. See ABA § 7-6.2, at 349 n.2. At present, at least 14 jurisdictions and the federal government impose significant restrictions on the use of mental health evidence in assessing *mens rea*.[13]

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[11] Petitioner contends that, "[u]ntil the nineteenth century, criminal law doctrines of *mens rea* handled the entire problem of the insanity defense." Pet. Br. 28 (quoting Morris, 33 Syracuse L. Rev. at 500). That is incorrect. At common law, insanity was an excuse on which the defendant bore the burden of proof. See *Patterson*, 432 U.S. at 202. Moreover, a defendant established the excuse by meeting an independent insanity test, not by disproving the intent element of the crime. See, *e.g.*, *Arnold*, 16 How. St. Tr. at 764-765 (jury charge that the defendant had "shot" and done so "wilfully" and that he could be "exempted from punishment" only if "totally deprived of his understanding and memory"); *Rex* v. *Ferrers*, 19 How. St. Tr. 886, 948 (H.L. 1760) (argument of Solicitor General that test of insanity was whether defendant could, at the time he committed the crime, "distinguish between good and evil").

[12] See *Sindram* v. *People*, 88 N.Y. 196, 197-198, 201 (1882); *United States* v. *Lee*, 15 D.C. (4 Mackey) 489 (1886); *Jacobs* v. *Commonwealth*, 15 A. 465, 466 (Pa. 1888); *Spencer* v. *State*, 13 A. 809, 814-815 (Md. 1888); *Dean* v. *State*, 17 So. 28, 29 (Ala. 1895); *State* v. *Holloway*, 56 S.W. 734, 735, 737 (Mo. 1900); *State* v. *James*, 114 A. 553, 561 (N.J. Ct. App. 1921); *People* v. *Troche*, 273 P. 767, 772 (Cal. 1928), appeal dismissed and cert. denied, 280 U.S. 524 (1929); *Foster* v. *State*, 294 P. 268, 271 (Ariz. 1930); *State* v. *Van Vlack*, 65 P.2d 736, 756-759 (Idaho 1937).

[13] See 18 U.S.C. 17(a); Cal. Penal Code § 28(a) (West 1999); La. Code Crim. Proc. Ann. art. 651 (West 2003); *State* v. *Taylor*, 781 N.E.2d 72, 84 (Ohio 2002); *Paul* v. *State*, 555 S.E.2d 716, 718 (Ga. 2001); *Morley* v. *State*, 747 N.E.2d 1123, 1128 (Ind. 2001); *People* v. *Carpenter*, 627 N.W.2d 276, 277 (Mich. 2001); *State*

Some jurisdictions prohibit the use of mental health evidence to negate the *capacity to form* the necessary mental state but admit the evidence on the issue whether the defendant *in fact formed* the required mental state. See *Haas* v. *Abrahamson*, 910 F.2d 384, 397-398 (7th Cir. 1990); *e.g.*, Cal. Penal Code § 28(a) (West 1999). Several federal courts of appeals have drawn a similar distinction in interpreting the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057.[14]

Not only do many jurisdictions restrict use of mental health evidence to disprove *mens rea*, but many federal and state courts have rejected due process challenges to those restrictions.[15] In light of the historical and contemporary landscape, petitioner cannot establish that use of mental health evidence to disprove *mens rea* is a "fundamental principle" that has experienced "uniform and continuing acceptance." *Egelhoff*, 518 U.S. at 48 (plurality opinion).

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v. *Nazario*, 726 So.2d 349, 350 (Fla. Dist. Ct. App. 1999); *Jones* v. *Harkness*, 709 A.2d 722, 724 (D.C. 1998); *Mott*, 931 P.2d at 1051; *State* v. *Schreiber*, 558 N.W.2d 474, 478 (Minn.), cert. denied, 522 U.S. 890 (1997); *Williams* v. *State*, 710 So.2d 1276, 1309 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929 (1998); *Smith* v. *Commonwealth*, 389 S.E.2d 871, 879-880 (Va. 1990); *State* v. *Flattum*, 361 N.W.2d 705, 716 (Wis. 1985); *Taylor* v. *State*, 452 So.2d 441, 448-450 (Miss. 1984).

[14] See, *e.g.*, *Pohlot*, 827 F.2d at 897-904; *United States* v. *Cameron*, 907 F.2d 1051, 1066 (11th Cir. 1990); *United States* v. *Brown*, 326 F.3d 1143, 1147 (10th Cir. 2003); *United States* v. *Worrell*, 313 F.3d 867, 873-874 (4th Cir. 2002), cert. denied, 538 U.S. 1021 (2003); *United States* v. *Hillsberg*, 812 F.2d 328, 332 (7th Cir.), cert. denied, 481 U.S. 1041 (1987).

[15] See, *e.g.*, *Wong* v. *Money*, 142 F.3d 313, 323-325 (6th Cir. 1998); *Welcome* v. *Blackburn*, 793 F.2d 672, 674 (5th Cir. 1986), cert. denied, 481 U.S. 1042 (1987); *Muench*, 715 F.2d at 1137-1145; *Campbell* v. *Wainwright*, 738 F.2d 1573, 1580-1582 (11th Cir. 1984), cert. denied, 475 U.S. 1126 (1986); *Wahrlich* v. *Arizona*, 479 F.2d 1137, 1137-1138 (9th Cir.), cert. denied, 414 U.S. 1011 (1973); *Carpenter*, 627 N.W.2d at 285; *Mott*, 931 P.2d at 1051; *Schreiber*, 558 N.W.2d at 478; *Williams*, 710 So.2d at 1309.

### D. There Are Sound Policy Reasons To Channel Evidence Of Mental Illness Into The Insanity Determination

There are several good reasons for a State to preclude consideration of evidence of mental illness in assessing *mens rea* and instead to channel that evidence into the insanity determination.

First, a State could conclude that psychiatric evidence does not sufficiently illuminate *mens rea* and presents too high a risk of erroneous acquittals. Courts and commentators alike have recognized that the reliability of psychiatric evidence is open to challenge.[16] Cf. *United States* v. *Scheffer*, 523 U.S. 303, 309-312 (1998) (concerns about the reliability of polygraph evidence justified a rule excluding it from courts-martial). Moreover, the uncertainty of psychiatric diagnosis allows expert witnesses to slant their testimony on their clients' behalf. See *Steele* v. *State*, 294 N.W. 2d 2, 13 (Wis. 1980). And, because "[t]he esoterics of psychiatry are not within the ordinary ken," *Wahrlich* v. *Arizona*, 479 F.2d 1137, 1138 (9th Cir.), cert. denied, 414 U.S. 1011 (1973), "judges and juries usually defer to psychiatric judgments" even though they may

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[16] See, *e.g.*, *Ake*, 470 U.S. at 81 ("[P]sychiatrists disagree widely and frequently on what constitutes mental illness" and "on the appropriate diagnosis to be attached to given behavior and symptoms."); *Jones*, 463 U.S. at 365 n.13 ("We have recognized repeatedly the uncertainty of diagnosis in this field and the tentativeness of professional judgment" (internal quotation marks omitted).); *Bethea* v. *United States*, 365 A.2d 64, 89 (D.C. 1976) (questioning the "validity and reliability" of psychiatric evidence ); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 737 (1974) (noting that "psychiatrists and behavioral scientists who have studied the reliability and validity of psychiatric judgments almost unanimously agree that such judgments are of low reliability and validity"). Of course, psychiatric testimony is deemed reliable enough to support judgments in certain contexts, *e.g.*, civil commitment. See *Foucha*, 504 U.S. at 76 n.3. But a State can legitimately rely on psychiatric evidence for some purposes without losing the ability to take into account special concerns about the impact of that evidence on a criminal trial. Cf. *United States* v. *Scheffer*, 523 U.S. 303, 312 n.8 (1998).

be unreliable or biased. *Bethea* v. *United States*, 365 A.2d 64, 89 (D.C. 1976) (quoting Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 737 (1974)).

Those problems are especially severe "where the issue is the subtle distinction between mental states such as those reflecting specific and general intent, as opposed to the question whether there existed a mental abnormality of sufficient magnitude to be labeled insanity." *Bethea*, 365 A.2d at 90. Indeed, some courts have concluded that "psychiatric testimony directed to a retrospective analysis of the subtle gradations of specific intent" does not have "enough probative value to compel its admission." *Wahrlich*, 479 F.2d at 1138. A State could therefore conclude that psychiatric testimony is reliable when used to assess insanity but not when used to make the fine-tuned distinctions involved in the *mens rea* determination. See *Steele*, 294 N.W.2d at 13. Accordingly, the State could reasonably decide to confine use of psychiatric testimony to the insanity determination.

A State could also choose to confine psychiatric evidence to the insanity determination in order to ensure that the mental illness excuse is structured as an affirmative defense. Because the defendant bears the burden of proof on an affirmative insanity defense, there is less risk that he will erroneously be excused from liability. Cf. *Patterson*, 432 U.S. at 207 (concern that "too many persons deserving treatment as murderers would escape that punishment" justifies decision to place burden of proving extreme emotional disturbance on defendant). Moreover, the insanity defense reflects the State's judgment about the circumstances in which an individual's mental illness is sufficiently severe to excuse liability for criminal conduct. Allowing a defendant to escape liability based on an additional, alternative test—lack of *mens rea* based on mental condition—reflects a significantly different

judgment. See *State* v. *Wilcox*, 436 N.E. 2d 523, 527 (Ohio 1982) (allowing defendants to assert diminished responsibility "could swallow up the insanity defense").

Indeed, Arizona's Supreme Court invoked preservation of the integrity of the insanity defense in explaining why the State precludes the use of mental health evidence to negate *mens rea*. See *State* v. *Schantz*, 403 P.2d 521, 525-529 (Ariz. 1965), cert. denied, 382 U.S. 1015 (1966). Other States have reached a different judgment about the appropriate circumstances in which to excuse criminal conduct and have eliminated the affirmative insanity defense. Instead, those States allow evidence of mental illness to be considered only in assessing the *mens rea* element of the offense. See p. 13, *supra*. The Due Process Clause, however, does not require a State to make one judgment rather than the other.

Finally, a State could conclude that precluding use of mental illness to negate *mens rea* is justified to protect the public from mentally-ill individuals who commit crimes. See *Bethea*, 365 A.2d at 91. As the Arizona Supreme Court has explained, if a defendant uses mental illness to disprove *mens rea*, he is acquitted and released into the general population. *Schantz*, 403 P.2d at 529. In contrast, a defendant found "guilty except insane" is confined in a state mental hospital until he proves that he is neither mentally ill nor dangerous. Ariz. Rev. Stat. Ann. § 13-502(D) (West 2001); *id.* § 13-3994. Thus, channeling mental illness evidence into the insanity determination prevents the "releas[e] upon society [of] many dangerous criminals who obviously should be placed under confinement." *Schantz*, 403 P.2d at 529.[17] Arizona's use of the terminology

[17] Although a State could establish procedures to commit a defendant found not guilty because mental disease prevented him from forming the necessary *mens rea*, it is uncertain whether the State could make a commitment based solely on the criminal verdict. If the State could not commit the defendant based on the verdict alone, the State might be required to bear a heavy burden to obtain the commitment. Compare *Jones*, 463 U.S. at 363-366 (concluding

"guilty except insane" to describe its insanity defense underscores the State's policy judgment that insanity does not negate a defendant's responsibility for the substantive offense (including its *mens rea* elements). Rather, the defense excuses from punishment someone whom the State views as "guilty" of the offense.

Ignoring these valid policy concerns, petitioner argues (Br. 23, 27-28) that a State cannot treat as equally culpable someone who kills intentionally or knowingly and someone who kills but, because of mental illness, is incapable of forming intent or knowledge. That argument misses the mark because Arizona does not treat those individuals the same. If a defendant proves that he was so incapable of forming intent or knowledge that he did not know the wrongfulness of his act, then he receives a different verdict and different treatment from a defendant without mental illness. As discussed above, a defendant who is determined to be "guilty but insane" receives psychiatric treatment rather than a prison term. See Ariz. Rev. Stat. Ann. § 13-502 (West 2001). To the extent Arizona treats as equally culpable all individuals who *are* aware of the wrongfulness of their criminal acts, the State is entitled to make that policy judgment. And the State is entitled to protect that judgment by channeling psychiatric evidence into the insanity defense.

### E. Petitioner's Argument That He Was Prevented From Rebutting The Prosecution's Factual Inferences Is Not Properly Presented And Lacks Merit

Petitioner contends (Br. 13-21) that the trial court independently violated his due process rights because it refused

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that an insanity acquitee may be committed without further procedures in part because he "committed an act that constitutes a criminal offense") with *Addington* v. *Texas*, 441 U.S. 418, 426-427 (1979) (holding that civil commitment requires the State to prove by clear and convincing evidence that the individual is mentally ill and dangerous).

to consider psychiatric evidence offered to rebut factual inferences drawn by the prosecution about his intent. This Court should not address that argument because petitioner did not raise it in the state courts, and those courts did not address it. See *Illinois* v. *Gates*, 462 U.S. 213, 218-220 (1983).

In the trial court, petitioner objected to the court's refusal to consider evidence of mental illness to show that he *lacked the ability or capacity* to form the intent required for first-degree murder. See, *e.g.*, Br. in Opp. App. G at 1, 9, 10. He never argued, however, that the court improperly failed to consider whether psychiatric evidence rebutted specific factual inferences drawn by the State. Because petitioner never presented that argument to the trial court, even though he had the opportunity to make an offer of proof, see J.A. 9, the court never ruled on the issue. Moreover, petitioner was permitted to introduce all of his mental illness evidence, see *ibid.*, so it is possible that the trial court in fact considered petitioner's rebuttal evidence in determining his guilt.[18]

Petitioner's argument in the court of appeals likewise focused on the trial court's refusal to consider mental illness evidence in evaluating petitioner's ability or capacity to form the requisite *mens rea*. See Pet. C.A. Br. 3, 46, 47, 48, 50, 52; Pet. C.A. Reply Br. 20. Petitioner did not argue that the trial court denied him the ability to rebut the factual inferences drawn by the prosecution. The court of appeals therefore did not address whether Arizona law precludes the use of psychiatric evidence to rebut the prosecution's factual inferences or whether such a preclusion would be constitutional. Addressing those issues likely would have required the court of ap-

[18] Petitioner incorrectly states (Br. 15) that the trial court relied on the State's "lines of factual inference" to find him guilty of murder. The court relied on "the entire record" in concluding that petitioner was guilty. J.A. 332. The court expressly relied on the factual inferences drawn by the prosecution only in rejecting petitioner's insanity defense. J.A. 333-334.

peals to analyze other Arizona decisions besides *Mott*. This Court should not address those issues in the first instance.[19]

In any event, petitioner is not correct that due process requires that he be allowed to use evidence of his mental illness to rebut factual inferences about his intent. A criminal defendant has the right "to present a complete defense" and to put the prosecution's case to "meaningful adversarial testing." *Crane* v. *Kentucky*, 476 U.S. 683, 690-691 (1985) (citations omitted). But that does not include the right to present evidence that is not relevant. See *id.* at 689; Ariz. R. Evid. 402. Evidence of petitioner's mental illness was "logically irrelevant" in determining whether he had the intent necessary to commit first-degree murder under Arizona law, because Arizona has "extract[ed] the entire subject of [mental illness] from the mens rea inquiry." *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring in the judgment) (citation omitted). As described above, to establish the required *mens rea* the State need prove only that the "defendant killed under circumstances that would otherwise establish knowledge or [in-

[19] It is not clear that Arizona law precludes use of psychiatric evidence to rebut the prosecution's factual inferences. Psychiatric testimony about "behavioral tendencies," such as a defendant's impulsive reaction to stress, may be admitted to rebut the element of premeditation, provided the testimony is not that the defendant was "*incapable*, by reason of a mental defect, of premeditation or deliberating." *Mott*, 931 P.2d at 1053-1054 (citing *State* v. *Christensen*, 628 P.2d 580 (Ariz. 1981)). The Arizona Supreme Court went to great lengths in *Mott* to distinguish *Christensen* from another of its previous decisions, *State* v. *Gonzales*, 681 P.2d 1368 (1984), in which psychiatric evidence was offered to establish the defendant's cognitive inability to form the requisite mental state. See *Mott*, 931 P.2d at 1054. In light of the *Mott* Court's distinction between *Christensen* (which it preserved) and *Gonzales* (which it overruled in part), the Arizona Court of Appeals could not have resolved petitioner's claim without carefully parsing Arizona precedents. And, if the court of appeals had done that, the Arizona Supreme Court might have granted plenary review. Under those circumstances, this Court should not address petitioner's forfeited claim.

tent] but for [the defendant's mental illness.]" *Ibid.* (citation omitted). Because Arizona defines intent based on the objective circumstances, assuming the defendant's "theoretical normality," *Fisher*, 328 U.S. at 466, petitioner's mental illness and its effect on his subjective intent had no bearing on whether the State proved its case.

Even if petitioner's mental health evidence were somehow relevant to his intent, due process would not give petitioner the right to insist on admission of the evidence. "[T]he introduction of relevant evidence can be limited by the State for a 'valid' reason." *Egelhoff*, 518 U.S. at 53 (plurality opinion) (citing *Crane*, 476 U.S. at 690). As discussed above, there are several valid reasons for Arizona to refuse to consider mental illness in assessing *mens rea* and to channel consideration of psychiatric testimony into the insanity determination. Those reasons apply both when that testimony is offered on the ultimate issue of intent and when the testimony is presented to rebut factual inferences used to establish that intent.

## CONCLUSION

For the foregoing reasons, the judgment of the Arizona Court of Appeals should be affirmed.

Respectfully submitted.

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MARCH 2006

(3)

No. 05-5966

IN THE

# Supreme Court of the United States

ERIC MICHAEL CLARK,
*Petitioner*,

v.

STATE OF ARIZONA,
*Respondent*.

**On Writ of Certiorari to the Arizona Court of Appeals**

## BRIEF *AMICUS CURIAE* FOR THE AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW SUPPORTING PETITIONER


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## INTEREST OF AMICI CURIAE

The American Psychiatric Association, with more than 36,000 members, is the Nation's leading organization of physicians that specialize in psychiatry. The American Psychological Association, with more than 155,000 members and affiliates, is the major association of psychologists in the United States. The American Academy of Psychiatry and the Law (AAPL), with roughly 2000 psychiatrist members, focuses on the intersection of psychiatry and the law, a subspecialty of psychiatry recognized by the Accreditation Council of Graduate Medical Education. All three organizations have participated in numerous cases in this Court. They and their members have a strong interest in one of the core matters of forensic psychiatry and psychology: the relevance of serious mental disorders to criminal punishment—specifically, their relevance both to the nearly universal insanity defense and to the intent elements of serious crimes. *See, e.g.*, Amer. Psychiatric Ass'n, *The Insanity Defense* (*"1982 Position Statement"*), Doc. No. 820002, and *Insanity Defense*, APA Doc. No. 85003 (1985 discussion with American Medical Association of latter's position, at the time, that mental-disorder evidence should be considered solely in adjudicating *mens rea* elements of offenses), available at www.psych.org/public_info/libr_publ/position.cfm.[1]

## STATEMENT

Until 1994, Arizona "uniformly adhered to" the historical test for insanity that had been articulated in *M'Naghten's Case* in Great Britain in 1843 and had been followed in Great Britain even in the 18th Century. *See State v. Schantz*, 98 Ariz. 200, 206-07 (1965). As codified in 1977, the test

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[1] No one but amici and their counsel authored, or made a monetary contribution to the preparation or submission of, this brief. Sup. Ct. R. 37.6. Both parties have filed blanket consent letters with the Clerk.

precluded criminal conviction if the defendant suffered from a mental disease or defect that meant he did not know the nature and quality of the act, or did not know that what he was doing was wrong. *Id.*; *see State v. Mott*, 187 Ariz. 536, 541 (1997) ("'A person is not responsible for criminal conduct by reason of insanity if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.'").

As of 1994, the Arizona legislature altered its insanity defense. It provided for a verdict of "'guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.'" Pet. App. A at 10-11 (¶ 24, quoting Ariz. Rev. Stat. § 13-502(A)). The defendant carries the burden of proof by clear and convincing evidence. *Id.* (citing Ariz. Rev. Stat. § 13-502(C)).[2]

The Arizona legislature also has defined the crime of first degree murder to cover "intentionally or knowingly killing a law enforcement officer who is in the line of duty." Pet. App. A at 5 (¶ 11); *id.* at 6 n.5 ("A.R.S. § 13-1105(A)(3) provides in relevant part that a person commits first degree murder if: 'Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.'").

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[2] This statute provides for a "guilty except insane" verdict, rather than the previous verdict of no criminal responsibility by reason of insanity. Petitioner has not raised any issue about that change, which may be of more nominal than practical importance, and so this brief assumes *arguendo* that the "guilty except insane" verdict is the equivalent of a verdict of not guilty by reason of insanity, and it addresses only the content of the standard for making the determination.

Petitioner Eric Clark was arrested for and charged with committing that crime on June 21, 2000. He was found incompetent to stand trial and spent several years under civil commitment and medical care, *see* 4/28/03 Letter from Dr. Morenz at 3-4, which included treatment with antipsychotic medication. 8/22/03 Tr. 29 (noting Clark was taking Haldol); 7/12/03 Letter from Dr. Morenz at 1, 6. Thereafter his competence was found to have been restored, 4/28/03 Letter from Dr. Morenz at 4, and he was tried on the murder charge.

The judge, who was the trier of fact, stated early in the proceeding that the State Supreme Court's decision in *Mott* precluded consideration of expert evidence on Clark's mental disorder in deciding whether the State met its burden of proving the *mens rea* element of the crime. The trial court thus allowed Clark to present his mental-disorder evidence but proposed to consider it only in deciding whether Clark met his burden of proving insanity. Resp. App. C at 5-6; Pet. App. A at 13 (¶ 31) (court of appeals summary of trial court ruling). At the trial, as the Arizona Court of Appeals stated, "[n]either party disputed the fact that Clark was suffering from a mental disease, paranoid schizophrenia, at the time of the murder, and that he had suffered from it for quite some time." Pet. App. A at 11 (¶ 26).

The trial court found for the State and against Clark. In its "special verdict," the court addressed two matters. It first found "beyond a reasonable doubt that the Defendant Eric Clark shot and caused the death of Police Officer Jeff Moritz." Resp. App. F at 1-2. The court did not state a specific finding of the *mens rea* element of the crime, though it is not disputed that the crime required at least knowledge that the shooting victim was a police officer. *See* Pet. App. A at 18-19 n.13 (court of appeals noting that "[t]he *mens rea* requirement for this crime was defined statutorily"); Br. in Opp. 7 & n.2.

The trial court then addressed the insanity defense. Resp. App. F at 2-5. It found the element of mental disease proved: "Both experts, all lay witnesses, and the attorneys agree that the Defendant suffers from a qualifying mental disease: paranoid schizophrenia"; and the State's expert testified that "'[t]here seems to be little doubt that on June 21, 2000, the Defendant was suffering from paranoid delusions.'" *Id.* at 3. But the court found that Clark had not proved the second component of the defense by clear and convincing evidence: that his "mental illness . . . distort[ed] his perception of reality so severely that he did not know his actions were wrong." *Id.* at 5.

On appeal from the guilty verdict, the Arizona Court of Appeals affirmed. Pet. App. A. It found sufficient evidence to support the inference that Clark knew that he was shooting a police officer. *Id.* at 8-10 (¶¶ 17-21). It also found no abuse of discretion in the trial court's determination that Clark did not prove insanity by the required clear and convincing evidence. *Id.* at 10-13 (¶¶ 22-30).

The court rejected Clark's contention that his due process rights were violated by Arizona's restriction of its insanity defense to circumstances where the defendant fails to know his actions are wrong, whereas the traditional standard speaks also of failure to know the "nature and quality" of the act. *Id.* at 15-16 (¶¶ 36-38). The court rejected, too, Clark's contention "that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder." *Id.* at 18 (¶ 43). After noting that Clark was allowed to *present* such evidence, the court concluded that the trial court, and it, were bound by the State Supreme Court's decision in *Mott*, "which held that 'Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea*

element of a crime.'" *Id.* at 19 (¶ 44) (quoting *Mott*, 187 Ariz. at 541) (footnote omitted).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Two questions are presented, and while they raise distinct issues, they are related. One question is the procedural-due-process question of whether a State may define a crime and then categorically preclude consideration of relevant, reliable, non-prejudicial, non-privileged evidence that may negate the State's proof of an element of that crime. The other question, essentially a matter of substantive due process, is what conditions of "insanity" constitutionally preclude serious criminal punishment. We discuss them in the order indicated because the resolution of the second might depend on the resolution of the first.

**I.** This Court should hold that a categorical preclusion of consideration of mental-disorder evidence on the *mens rea* elements of the crime charged—here, intentional or knowing killing of a police officer—is unconstitutional. A fundamental due process right is the right to present relevant, reliable, non-prejudicial, non-privileged evidence to negate the State's effort to prove the elements of the crime beyond a reasonable doubt. Mental-disorder evidence, in relation to *mens rea* elements of the sort at issue in this case, comes within that right. And there is no apparent justification sufficient to support Arizona's categorical exclusion of such evidence. Once a State has defined the *mens rea* elements of the crimes charged, it may not secure convictions by a wholesale bar on considering mental-disorder evidence – which the legal system pervasively recognizes as reliable and thus depends on—when it bears on whether those elements are actually present. Reversal and remand for new trial-court findings are required on this ground.

**II.** As to the insanity defense, *amici*'s principal submission is that substantive due process analysis strongly supports a constitutional threshold. In particular, as relevant here,

history and overwhelming current practice support a constitutional rule that precludes serious criminal punishment of one who, because of a mental disease, lacked rational appreciation of the wrongfulness of his conduct when engaging in it. That rule reflects longstanding and still-pervasive principles that set preconditions for serious criminal culpability.

**III.** How that principle applies here (and would be applied on a remand after reversal under Argument I) is not perfectly certain. With no dispute here that Clark has a serious mental disease, the question concerns only the remaining statutory requirement of knowledge of wrong. Although Arizona in 1994 deleted separate "nature and quality" language from its statute, the knowledge-of-wrong standard on its face can be understood itself to demand rational appreciation of the nature and quality of the act, and that understanding is reflected in the state appellate court's opinion in this case (and to some extent in the trial court's opinion). That sensible understanding would render Arizona's law constitutional. On the other hand, if Arizona's law were to be applied narrowly, a constitutional issue would arise. Even then, however, for a case involving a specific-intent crime, the standard *could* be valid as applied if (as we argue) the trier already were required to consider mental-disorder evidence on the *mens rea* elements of the crime, and in doing so found knowledge of the nature and quality of the act as part of the affirmative proof of the crime, leaving no such issue for a separate insanity defense.

## ARGUMENT

A practical aspect of the relation between the two questions presented, the defense and affirmative-element issues, is worth bearing in mind from the outset. A defendant's failure to meet *his* burden of proving insanity (here, by clear and convincing evidence) would not mean that the State, even on the very same evidence, necessarily can meet *its* burden of proving intent beyond a reasonable doubt. That would be so

even if the substance of the inquiries were identical, but, in fact, there might well be differences in the inquiries, depending on precisely what meaning is given to insanity (here, knowledge of wrong) and *mens rea* (here, knowing killing of a police officer). The essential point is that it matters how the trier must adjudicate the intent elements the State must prove, regardless of the insanity conclusion, and we begin with the intent issue.

## I. Due Process Prohibits A State From Categorically Barring Consideration Of Evidence Of Mental Disorders Relevant To The Intent Element Of The Charged Crime

**A.** As interpreted and applied in this case, the Arizona Supreme Court decision in *State v. Mott*, 187 Ariz. 536 (1997), held that Arizona law categorically prohibited a trier of fact in a criminal case from considering mental-disorder evidence in deciding whether the State met its burden of proving a required *mens rea* element of the offense it charged, even if such evidence otherwise met the usual standards of relevance and reliability and could not be tagged as breaching privileges or causing prejudice to accurate assessment of the factual questions raised by the criminal charge. It held, too, as Arizona acknowledges here, that the federal Constitution permitted that prohibition. *See Mott*, 187 Ariz. at 541-45; Br. in Opp. 9 ("*Mott* rejected a due process claim"). That ruling thus resolved both the state-law and federal-law issue of whether the defendant had a right to have such evidence considered.

Clark's second question here challenges the federal-law aspect of *Mott*. The question is not whether evidence must be *admitted*—Clark does not appear to have been restricted in *presenting* evidence—but whether the State may categorically forbid its *consideration*, even if relevant, reliable, non-prejudicial, and not privileged. In this case, there is no reliable indication that the trial court considered the mental-

disorder evidence in deciding whether the State met its burden of proving that Clark had the requisite intent to kill a police officer.[3]

Clark strongly appears to have preserved his challenge on this federal due process ground.[4] And the Arizona Court of Appeals did not reject the challenge on an adequate and independent state ground, procedural or factual. It made no determination that a claim to consideration of the mental-disorder evidence had been waived or that such consideration would make no difference to any reasonable finder of fact in assessing the State's proof of *mens rea*.

The court of appeals said: "Aside from the evidence offered to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer. Even assuming such evidence was sufficient, the trial court was bound by the supreme court's decision in *Mott* . . . ." Pet.

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[3] The trial court said at the outset that it read *Mott* to bar such consideration, Resp. App. C at 5-6, and it never spoke to the contrary. Nor does the court's "special verdict" (Resp. App. F) show consideration of the evidence on the criminal intent issue. The court did not separately discuss the intent element of the crime charged (though the trial court presumably found that element implicitly), and it discussed the mental-disorder evidence only in its analysis of the insanity defense, where the defendant had the burden of proof. *Id.* at 2-5. Even in its insanity discussion, moreover, the court did not find as a fact (under any burden of proof) that Clark was aware that Officer Moritz was a police officer. All the court said was that it "considered the following *evidence*: ... that the Defendant was aware that Officer Moritz was a police officer." *Id.* at 4 (emphasis added).

[4] Arizona, in opposing certiorari, extensively argued waiver of this challenge, but the Court granted review. The trial court stated early on that it was bound by *Mott* to disregard mental-disorder evidence in deciding whether the State proved the required intent to kill a police officer, *see* Resp. App. C at 5-6, and Clark in turn challenged the soundness of *Mott*. Because *Mott* resolved the federal due process question, Clark's challenge to *Mott* raised the federal-law issue.

App. A at 19 (¶ 44). That statement makes no procedural-default point: indeed, it appears to treat "the evidence offered to prove [Clark's] insanity generally" as itself constituting an "offer of proof" for purposes of the intent element. *Id.* ("*Aside from* the evidence offered to prove his insanity generally, . . .") (emphasis added). The statement also falls at least three steps short of making any factual finding that could moot consideration of the claim of federal right to have the evidence considered in assessing the State's effort to carry its burden of proving *mens rea* beyond a reasonable doubt. First, it does not deny that the "evidence offered to prove his insanity" could suffice to establish that Clark was not even "capable" of knowing that he was killing a police officer. Second, it does not address whether that evidence could show that he *in fact did not know* that he was killing a police officer (even if he was capable of so knowing). Third, it says nothing on the directly pertinent question: might the evidence have led to a finding that *the State had not met its burden* of proving *mens rea* beyond a reasonable doubt? That is a separate matter from whether, as the court of appeals held, there was sufficient evidence from which a finding of knowingly killing a police officer *could* be made. *Id.* at 8-10 (¶¶ 17-21). Accordingly, *Mott*'s categorical prohibition on considering mental-disorder evidence relevant to *mens rea*, as relied on by the Arizona courts, is before this Court.

**B.** That prohibition does not withstand constitutional analysis under several closely related core principles of due process. A State must prove every element of the charged crime beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), and cannot shift the burden of proof on a required element of mental state. *Sandstrom v. Montana*, 442 U.S. 510 (1979). Even more fundamentally, an "essential component of procedural fairness is an opportunity to be heard," and that guarantee creates a constitutional presumption against "exclud[ing] competent, reliable evidence . . .

when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The presumption can be overcome only by affirmative justification "closely examined" on judicial review to ensure protection of what surely lies at the very core of due process: the right to present evidence "to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295, 294 (1973); *cf. United States v. Scheffer*, 523 U.S. 303, 308 (1998) (plurality opinion recognizing "defendant's right to present relevant evidence," "subject to reasonable restrictions"). In accordance with such fundamental principles, the Court explained in *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987), that it would be a violation of the *Winship* principle for a State to preclude a jury's consideration of self-defense evidence "in determining whether there was a reasonable doubt about the State's case."

In *Montana v. Egelhoff*, 518 U.S. 37 (1996), Justice O'Connor, joined by Justices Stevens, Souter, and Breyer, summarized the principles of *Crane*, *Chambers*, *Washington v. Texas*, 388 U.S. 14 (1967), and other decisions:

> These cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations. Meaningful adversarial testing of the State's case requires that the defendant not be prevented from raising an effective defense, which must include the right to present relevant, probative evidence. To be sure, the right to present evidence is not limitless; for example, it does not permit the defendant to introduce any and all evidence he believes might work in his favor, nor does it generally invalidate the operation of testimonial privileges. Nevertheless, "an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence" that is essential to the accused's defense.

> [The Montana law at issue] forestalls the defendant's ability to raise an effective defense by placing a blanket exclusion on the presentation of a type of evidence that directly negates an element of the crime, and by doing so, it lightens the prosecution's burden to prove that mental-state element beyond a reasonable doubt.

*Egelhoff*, 518 U.S. at 63-64 (O'Connor, J., dissenting) (internal citations omitted). Justice Ginsburg, who provided the critical vote in the case, did not disagree with the foregoing due-process principles, but only their application; she concluded that they were not impaired by the Montana law, a tradition-based treatment of voluntary intoxication that effectively redefined the crime. 518 U.S. at 58-59.

**C.** The *Mott* preclusion of judicial consideration of mental-disorder evidence strikes at the heart of the foregoing due process guarantees.[5] It deprives the defendant of the right to consideration of evidence that may directly undermine any inference of the requisite intent—here, intent to kill a person knowing that the person is a police officer. Evidence of psychotic delusions can bear directly on that issue, indeed may be virtually the sole evidence the defendant has available on that issue. Precluding its consideration thus strips the defendant of the constitutionally guaranteed opportunity to present a defense, which *Martin* adds is essentially an extreme form of relieving the State of the burden of proof it constitutionally must bear.

For this reason, when Congress codified the federal insanity defense, 18 U.S.C. § 17, it left undisturbed the general right of the defendant to have mental-disorder evidence considered on the affirmative elements of the offense. "Both

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[5] Both the procedural due process and substantive due process analyses in this brief have their counterparts in analyses applicable to mental retardation (embraced within the traditional "mental disease or defect" formulation of the insanity defense). That situation is not otherwise addressed in this brief, because it is not presented in this case.

the wording of the statute and the legislative history leave no doubt that Congress intended, as the Senate Report stated, to bar only alternative 'affirmative defenses' that 'excuse' misconduct[,] not evidence that disproves an element of the crime itself.'" *United States v. Pohlot*, 827 F.2d 889, 897 (3d Cir. 1987).[6] And it did so after the Attorney General recognized the need to preserve consideration of such evidence in adjudicating *mens rea*:

> "Under any approach, the Government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by the statute. In the rare case, therefore, in which a defendant is so deranged that, for example, he did not know that he was shooting a human being, one of the elements of the offense could not be proved—the mental element of *mens rea*—and *he could not be convicted* under current law or *under any constitutionally supportable change in the law*."

*Id.* at 902 (quoting testimony of Attorney General William French Smith) (emphasis added).

Expert evidence about mental disorders, pervasively treated as reliable and in fact relied on in our legal system, can bear directly on *mens rea* questions. For example, the delusions that are one defining characteristic of schizophrenia

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[6] Fed. R. Crim. P. 12.2 explicitly contemplates the introduction of evidence on mental disorder for adjudication of elements of the crime. On the other hand, Fed. R. Evid. 704(b) places a limit on statements by experts on the "ultimate issues" of whether the defendant had "the mental state or condition constituting an element of the crime." The latter has generally been construed, consistent with its language and the underlying general constitutional right to present relevant and reliable evidence, to bar only expert statements on the ultimate issue, not expert evidence that might lead the trier of fact to draw inferences about the ultimate issues. *See, e.g., United States v. Bennett*, 161 F.3d 171, 183 & n.4 (3d Cir. 1998) (reviewing various circuit-court decisions); *United States v. Schneider*, 111 F.3d 197, 201 (1st Cir. 1997).

affect an individual's beliefs and, hence, the individual's understanding of what he is doing and, hence, his knowledge, intent, or purposes. *See* Amer. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 299, 313-14 (4th ed. Text Revision 2000) ("*DSM-IV-TR*"). If the defendant is so delusional that he does not know that he is killing, or that the person at whom he is aiming is a police officer (or even a human being), he does not, in fact, have the intent required by the definition of the crime by its plain terms. To forbid consideration of the expert evidence of such delusions, and all serious cognitive impairments, is to blind the trier of fact to relevant, reliable, non-prejudicial evidence and to produce false factual findings in some cases. *See Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) ("a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained").

In the present case, the State had to prove knowing killing of a police officer, and there was expert mental-disorder evidence pointing to the absence of such *mens rea*. It was undisputed that Clark was suffering from a serious psychotic illness at the time of his acts. 8/22/03 Tr. 61 (State: "the state has not and does not intend to challenge the fact that the defendant suffers from a mental illness or a mental defect, and that it's most likely schizophrenia paranoid type"); Pet. App. A at 11 (¶ 26). And Clark's psychiatric expert concluded: "It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense, but given that he was very psychotic before and after the alleged offense, it is reasonable to infer that his perception[] of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality; thus, there [is] considerable evidence that indicates Mr. Clark probably did not know his acts were wrong at the time of the alleged offense." 8/22/03 Tr. 101-102 (Resp. App. D), quoting 7/12/03 Letter from Dr. Morenz at 7 (referred to as "report," Defense Exhibit 5A,

8/22/03 Tr. 38).[7] Clark's delusional beliefs, in fact, were one key premise of the undisputed diagnosis of schizophrenia, paranoid type. *DSM-IV-TR* 313-14.

There is no occasion for this Court to say what a trier of fact in this case would make of the evidence of mental disorder and its symptoms, including delusions, when considered among all the pertinent evidence. Nor is there a dispute about trial courts' general authority to find particular mental-disorder evidence in a particular case insufficiently probative on a particular *mens rea* issue to warrant admission. The sole issue is whether a State may categorically preclude a trier of fact, when adjudicating criminal guilt, from even

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[7] *See also* 8/22/03 Tr. 36 (probable that Clark was insane); 37 (Clark suffers from paranoid schizophrenia); 38 (psychotic from months before the shooting); 25, 29, 32, 39, 43, 47-48, 72 (describing Clark's delusions about some people being aliens and "difficulty perceiving reality as you and I see it"); 47 (expert "can't imagine" that Clark was trying to lure police officer to ambush him); 55 (fact that Clark "wasn't shouting expletives, you know, at strangers in the theater or at the restaurant [before the killing] does not mean that he was not still believing that people were aliens, that people were trying to poison him, and that very strange and malevolent things were transpiring around him. ... In fact, I think there's a lot of reason to think that all those beliefs were still very much present, still affecting his behavior, and probably had a major impact and influence in a major way on what he did when he killed the policeman."); 59 ("no one knows exactly what was on Eric's mind, but given how psychotic he was before and immediately after and everything we know about schizophrenia, I think that it is fair and probable that he did not understand what he was doing was, you know – that they did not understand right from wrong"); 73 ("it does seem that he was experiencing some external forces that were communicating with him [through television and radio and license plates] and might have been influencing his behaviors"); 88-89, 110-112 (expert reached his conclusion even after considering testimony that weeks earlier Clark had said he was going to lure a police officer by firing a gun into the air); *see also* 7/22/03 Letter from Dr. Moran, Ph.D., State's expert, at 44 (post-arrest statements by Clark about aliens).

considering mental-disorder evidence bearing on a required *mens rea* element (here, knowing killing of a police officer).

**D.** There is no apparent justification sufficient to support Arizona's categorical bar with its severe potential impairment of defendant's due process rights. *See* 2 American Bar Ass'n, *Standards for Criminal Justice* p. 7-291 (2d ed. 1986) ("rulings excluding [expert testimony on *mens rea*] are constitutionally infirm"). To begin with, for a mental disease like the paranoid schizophrenia at issue here, the key policies behind the rule for voluntary intoxication at issue in *Egelhoff* are starkly absent. In the present setting, there simply cannot be any question about blameworthiness for voluntarily creating a state of mind where *mens rea* is lacking, or about a State's interest in deterring self-created impairments. *See* note 10, *infra* (noting age-old distinction between voluntary intoxication and mental disorder).

Expert evidence of mental disorders, presented by qualified professionals and subject to adversarial testing, is both relevant to the mental-state issues raised by *mens rea* requirements and reliable. It is not infallible, of course. It is only the best that human study, based on clinical experience and scientific research, has to offer on mental-state issues. Such evidence could not be condemned wholesale without unsettling the legal system's central reliance on such evidence in dealing with mental-state issues in criminal, civil-commitment, and numerous other settings. Even insanity, moreover, rarely becomes an unresolvable battle of experts: "consensus on the nonresponsibility issue is commonplace." *ABA Standards* p. 7-306.

The general reliability and frequent centrality of expert evidence on mental disorders, applied to a criminal defendant's right to "a fair opportunity to present his defense," are the very premises of this Court's ruling that defendants asserting insanity (or facing the death penalty if future dan-

gerousness has been placed in issue) have a constitutional right to a State-funded mental-health expert, akin to the constitutional right to a State-funded attorney. *Ake*, 470 U.S. at 76. Based on "the pivotal role that psychiatry has come to play in criminal proceedings" (*id.* at 79), the Court ruled:

> when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. . . . Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, *Solesbee v. Balkcom,* 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

*Id.* at 80-81. That analysis is properly stated in terms relevant not only to insanity itself but more generally to "mental condition relevant to . . . criminal culpability." *Id.* at 80.

Nor can *Mott* be justified by reference to the few other well-founded justifications for excluding evidence that might otherwise be relevant and reliable. There is no apparent basis for categorically considering such evidence to be confusing, misleading, or otherwise prejudicial to an accurate assessment of *mens rea* matters. Indeed, such evidence, given its provenance in expert study and experience, is more, not less, important than other types of evidence to making the best determination of *mens rea* matters. Wholesale preclusion, moreover, can hardly be justified on grounds of cumulativeness.[8]

*Mott*'s rule, moreover, finds no justification in the policies underlying privilege law. Privileges are of ancient origin and reflect deliberate, experience-based determinations that it is vital "to encourage effective communications within certain relationships." *Egelhoff*, 518 U.S. at 67 (O'Connor, J., dissenting). And the evidence excluded by privileges may not even exist without them, for the communication may never have been made if not protected from disclosure. *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996). The deeply rooted policies behind evidentiary privileges offer no support for categorical preclusion of consideration of reliable, non-prejudicial mental-disorder evidence relevant to a mental-state element of a crime.

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[8]As noted, particular mental-disorder evidence might be found insufficiently relevant to particular issues of purpose, intent, or knowledge in particular cases. In *Fisher v. United States*, 328 U.S. 463 (1946), a divided Court upheld a refusal of the trial court, as a matter of District of Columbia law, to give a special instruction that certain mental-disorder evidence should be considered in distinguishing first- and second-degree murder, apparently concluding that the evidence did not sufficiently bear on the legal elements distinguishing those offenses. Even in *Fisher*, the jury was instructed on the *mens rea* elements, with no bar on considering the mental-disorder evidence. Fisher presented no due process question, and the decision pre-dates this Court's subsequent elaboration of the rights to present a defense and to have the State prove the elements of the crime beyond a reasonable doubt.

The problems with this preclusion extend beyond the unjustified impairment of the individual defendant's rights in the criminal trial. The preclusion means that defendants who do not in fact come within a criminal prohibition's terms, even as judicially construed, may nevertheless be convicted of violating the prohibition. That result, certainly in a State like Arizona that has no common-law crimes, violates the due process guarantee of fair warning. *See Rogers v. Tennessee*, 532 U.S. 451, 457-58 (2001); *United States v. Lanier*, 520 U.S. 259, 266 (1997).[9]

At the same time, the result is to undermine democratic accountability for the legislature's calibration of how serious a crime particular conduct constitutes, and how severe the punishment should be, within an overall scheme of criminal penalties for a variety of conduct of disparate seriousness. The processes of legislative deliberation, and of public assessment of the resulting determinations, can break down when a criminal proscription is applied (because of a preclusion rule like Arizona's) to conduct that does not in fact come within it. Conduct that has not actually been legislatively determined to warrant the criminal punishment being applied is being subjected to that punishment. The result is a kind of masquerade from the legislature's and electorate's points of view, undermining the "[t]ransparency [that] is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Smith v. Doe*, 538 U.S. 84, 99 (2003).

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[9] Common-law crimes are, generally speaking, "utterly anathema today" (*Rogers*, 532 U.S. at 476 (Scalia, J., dissenting)), and in Arizona they have specifically been abolished. *See State v. Lopez*, 174 Ariz. 131, 141 (1992) ("there were and are no common law crimes in Arizona"); *State v. Cotton*, 197 Ariz. 584, 586-87 (Ct. App. 2000) (discussing Ariz. Rev. Stat. § 13-103: "Although there are no longer common law crimes in Arizona, the legislature continued in force the established common law meanings of terms used in the criminal statutes.") (footnote omitted).

## II. Substantive Due Process Analysis Strongly Supports A Rule Barring Serious Criminal Punishment Of A Defendant Who, Because Of Mental Disorder, Lacked A Rational Appreciation Of The Wrongfulness Of His Conduct

**A.** Substantive due process analysis governs how a State may define the substantive bases for criminal punishment. The inquiry is whether the law "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring in the judgment) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)); *id.* at 43 (plurality opinion); *id.* at 71 (dissenting opinion).

In *Egelhoff* Justice Ginsburg provided the critical fifth vote for upholding a Montana statute that precluded proof of voluntary intoxication to negate *mens rea*, viewing the rule as essentially redefining the *mens rea* element of crimes. *Id.* at 58-59. In upholding the law, Justice Ginsburg, together with the plurality, relied on "the lengthy common-law tradition" supporting that rule, together with "the adherence of a significant minority of the States to that position." *Id.*; *see id.* at 43-49 (plurality opinion). The insanity defense, at issue here, is a quite different matter under that analysis.[10]

**B.** There is a strong constitutional basis for precluding serious criminal punishment of a defendant who, because of a

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[10] As far back as Lord Coke, the common law distinguished a "lunatic that hath sometime his understanding, and sometimes not," who is "*non compos mentis*, so long as he hath not understanding," from one who "by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken," a "kind of *non compos mentis* [that] shall give no privilege to him or his heirs." Quoted in Quen, *Anglo-American Criminal Insanity: An Historical Perspective*, 2 Bulletin Amer. Acad. Psychiatry & L. 115, 116 (1974). *See also* 4 W. Blackstone, *Commentaries on the Laws of England* 24-26 (1979 facsimile of 1769 edition) (making same distinction).

mental disorder, lacks rational appreciation of the wrongfulness of his conduct. The formulations of the legal tests for insanity have varied over the years, and all the formulations have presented challenges: sometimes there are difficulties in application; sometimes debate about the meaning of terms; sometimes imperfection in precisely capturing underlying notions of culpability. But the presence of variations and imprecisions should neither obscure the common core nor preclude constitutional recognition of that core as a requirement for serious criminal punishment. After all, "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

The plurality in *Egelhoff* stated that the "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." 518 U.S. at 43 (plurality opinion). Our legal tradition has long and pervasively precluded serious criminal punishment when acts result from mental disorders that impair the understanding of one's acts relevant to culpability (blameworthiness). A formulation that can capture the common core of that tradition, and hence strongly supported as a constitutional requirement, is that serious criminal punishment is barred when a mental disease deprives the defendant of rational appreciation of the wrongfulness of his conduct at the time of the conduct.

Various sources trace the history of an insanity defense. *E.g.*, S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 707-19 (American Bar Foundation 3d ed. 1985); *ABA Standards* pp. 7-287 to 7-290, 7-295 to 7-299; Quen, *supra*; Giorgi-Guarnieri, *et al.*, *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. Amer. Acad. Psychiatry & L. No. 2, Suppl. (2002). The notion that a certain level of understanding is a precondition to the culpability required for

criminal punishment has ancient roots. *E.g.*, *ABA Standards* pp. 7-288 to 7-289 & n.8; Quen, at 115-16; *Mentally Disabled & Law* 708-09. In English law, Lord Coke wrote of the "lunatic" that "hath not his understanding" as avoiding criminal punishment, and Sir Matthew Hale in the early 18th Century wrote:

> "The consent of the will is that which renders human actions either commendable or culpable; ... where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen ... it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions."

Quoted in Quen, at 116; *see also ABA Standards* p. 7-289.

Blackstone explained that among those not "*capable* of committing crimes . . . or, which is all one, who are exempted from the censures of the law" are those who have a certain "want or defect of *will*," which is "the only thing that renders human actions either praiseworthy or culpable." 4 Blackstone at 20-21. The required will is missing "[w]here there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, . . . : he therefore, that has no understanding, can have no will to guide his conduct." *Id.* at 21. Specifically, "a deficiency in will, which excuses from the guilt of crimes, arises . . . from a defective or vitiated understanding, *viz.* in an *idiot* or *lunatic*." *Id.* at 24.

In 1843, following an acquittal on grounds of insanity, the House of Lords articulated a standard for insanity in

*M'Naghten's Case*, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843):

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

*See also ABA Standards* p. 7-295; *Mentally Disabled & Law* 709. That standard, which focuses on cognitive deficiencies, "became the accepted standard in both [the United States and Great Britain] within a short period of time." *ABA Standards* p. 7-295.

Formulations of the insanity defense in the United States were not completely uniform, though departures generally broadened the defense. New Hampshire adopted a standard that inquired simply whether the otherwise-criminal act was "the offspring and product of mental disease." Quoted in *id.* p. 7-296. Other States precluded conviction not only where the *M'Naghten* cognitive-impairment test was met but also where a standard based on volitional impairment ("irresistible impulse") —inability to control oneself—was met. *Id.* From 1900 through the 1950s, *M'Naghten*'s standard governed in most jurisdictions, while about one third of the States added an irresistible-impulse test. *Id.*

In 1955, the American Law Institute (ALI) proposed a standard for non-responsibility that applied when either a cognitive or volitional defect was present:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate

> the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

Quoted in *id.* p. 7-297. By the early 1980s, the ALI formulation, or some close variant, governed in the federal courts and in "a majority of the country's jurisdictions." *Id.*[11]

Then, prompted in significant part by John Hinckley's acquittal on grounds of insanity for shooting President Reagan, some jurisdictions reformed their law. In particular, some abandoned the volitional-impairment part of the ALI test. Thus, Congress in 1984 enacted a statute that codified the basic *M'Naghten* standard, 18 U.S.C. § 17(a):

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

State law continues overwhelmingly to provide for an insanity defense with at least a cognitive-defect standard, though wording varies. *See AAPL Practice Guideline* at S31-S37 (state by state survey, 2000-2001); *see also Mentally Disabled & Law* 769-777 (state by state survey, mid-1980s).

Thus, not only is the common law tradition governing insanity sharply different from the tradition regarding voluntary intoxication that was at issue in *Egelhoff*, but so too is the present state of the law. In contrast to the situation presented in *Egelhoff*, there is no "significant minority" of States (518 U.S. at 58-59 (Ginsburg, J., concurring in the judgment)) allowing serious criminal punishment of those who, because of mental disorder, lack rational appreciation of wrongfulness. In

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[11] The D.C. Circuit followed a version of New Hampshire's "product rule" from the time of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), until 1972, when it adopted the ALI standard instead, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

only five States have legislatures statutorily eliminated an insanity defense, *see AAPL Practice Guidelines* (Nevada, Kansas, Utah, Idaho, and Montana), hardly a substantial number. In one, the State Supreme Court found the elimination invalid under the state and federal constitutions, because it allowed conviction where the *mens rea* elements of crimes were not present (*Finger v. State*, 117 Nev. 548 (2001)), and the legislature has now reinstated an insanity defense. 2003 Nevada Laws Ch. 284; Nev. Stat. §§ 174.035(4), 194.010(3). In the other four States, insanity evidence still must be considered in adjudicating the *mens rea* elements of crimes. *See State v. Bethel*, 275 Kan. 456, 464-69, 473 (2003); *State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Searcy*, 118 Idaho 632 (1990); *State v. Korell*, 213 Mont. 316 (1984). Depending on how they are defined, the *mens rea* elements of crimes may require, and thus allow mental-disorder evidence that addresses, rational appreciation of wrongfulness.

The early pronouncements quoted above (*e.g.*, of Hale and Blackstone) identify the principles underlying the longstanding tradition and continuing practice today. The insanity defense "come[s] to us as part of a tradition which makes the notion of 'desert' or 'blame' central to criminal responsibility." A. Goldstein, *The Insanity Defense* 9 (1967). "The Anglo-American legal tradition is grounded on the premise that persons are normally capable of free and rational choice between alternative acts and that one who chooses to harm another is thus morally accountable and liable to punishment. If, however, a person for any reason lacks the capacity to make rational choices or to conform his behavior to the moral and legal demands of society, traditionally he has been relieved of criminal responsibility and liability for his actions." *Mentally Disabled & Law* 707.

This Court itself has recognized that "the two primary objectives of criminal punishment [are] retribution [and] deterrence." *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997); *see id.* at 373 (Kennedy, J., concurring) (stressing

criminal-law's functions of "retribution and general deterrence"). But retribution is dependent on having "affix[ed] culpability," and criminal culpability, and hence retribution, traditionally turn on the type of understanding required for *scienter*. *Hendricks*, 521 U.S. at 362 (concluding that absence of *scienter* supported civil character of sexual-predator-commitment statute, which is therefore not "retributive"). Without the required understanding, the retribution objective thus does not generally apply. Nor does the deterrence objective. "A person lacking the required intelligence, reasoning ability, and foresight capacity to understand the [criminal] code or its sanctions will not be deterred by them . . . ." *Mentally Disabled & Law* 707.

There are probably multiple ways to define the type of understanding that is at the core of the culpability concept in our tradition. The important substantive point is that too narrow a view—bare awareness of the physical character of one's act, or that society might view it as a bad or even unlawful act—would fail to capture the central requirement of a *rational* understanding. *Cf. Dusky v. United States*, 362 U.S. 402 (1960) ("rational understanding" standard for competence to stand trial); *see also Godinez v. Moran*, 509 U.S. 389, 396 (1993). For that reason, although *M'Naghten*'s "know" *can* be applied broadly enough, the facially broader term "appreciate" has been preferred by Congress, the American Law Institute, the American Bar Association, and the American Psychiatric Association. *ABA Standards* pp. 7-307 to 7-308 (explaining reasons). Other useful formulations that suggest the needed breadth, reflected in the "defect of reason" aspect of the *M'Naghten* standard, were suggested by Herbert Fingarette in *The Meaning of Criminal Insanity* 200, 238 (1972): "the capacity to rationally assess – define and evaluate—his own particular act in the light of the relevant public standards of wrong"; "The defect of reason must be such that the person cannot be rational with respect to (cannot respond to what is essentially relevant to) the moral-legal

status of his act." *See also Mentally Disabled & Law* 719 ("rational knowledge and understanding"); Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A.J. 194, 195 (1983) ("it is fundamentally wrong to condemn and punish a person whose rational control over his or her behavior was impaired by the incapacitating effects of severe mental illness").

The persistent core of insanity in our legal tradition, thus, is a cognitive impairment caused by mental disorder. And that is all that is at issue in this case. The absence in Arizona's statute of a volitional aspect of the ALI test is not, as far as amici can discern, an issue presented by Clark to this Court. Indeed, the insanity testimony by Clark's expert does not appear to present evidence bearing on incapacity for self-control in any way separate from the cognitive deficiencies that are part of the mental disease from which Clark suffered.[12]

## III. Arizona Law Comports With Substantive Due Process If It Is Broadly Enough Construed And Applied

The validity of Arizona's insanity defense depends on how broadly it is construed and applied. If its knowledge-of-wrong standard is understood, as logic suggests, itself to require rational appreciation of the nature and quality of the act, then it comports with constitutional requirements despite

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[12] Twenty years ago, the ABA and the American Psychiatric Association suggested standards that did not make separate provision for a volitional test, essentially for practical reasons—which there is no occasion in the present case to explore with whatever insight current learning would supply. *1982 Position Statement* at 5-6 (appreciation of wrongfulness standard); *ABA Standards* p. 7-299 (ABA resolution), pp. 7-304 to 7-306 (analyzing alternatives); *see also* Bonnie, *supra*; Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 Bull. Amer. Acad. Psychiatry & L. 5, 14-19 (1984). The ABA and the American Psychiatric Association also suggested a severity-related concept for the "mental disease" requirement.

the absence of a *separate* statement of such a requirement. Otherwise, the Arizona law in general would present a serious constitutional problem. Even that problem, however, might become harmless in a particular case if the Arizona courts had to consider mental-disorder evidence in adjudicating the *mens rea* elements, as we have argued they must.

**A.** With no dispute in this case about the presence of a serious psychosis, the sole issue is Arizona's omission from its insanity defense of a separate requirement of appreciation of the "nature and quality" of the act. But the knowledge-of-wrong standard that Arizona has adopted certainly can, and should, be understood broadly enough to make that omission unimportant. A genuinely rational appreciation of wrongfulness itself has commonly been understood to include a rational understanding of the act. *See* R. Bonnie, J. Jeffries, & P. Low, *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 19 n.o (2d ed. 2000); Fingarette, at 200 (rational assessment involves both reasoned definition and reasoned evaluation). On that natural understanding, procedural due process itself (*see* Argument I) would require consideration of the defendant's appreciation of the nature and quality of his act.

The natural interdependence of the "wrong" and "nature and quality" components of the *M'Naghten* formulation is reflected in this Court's reference to the *M'Naghten* standard as simply a "right-wrong" test. *Powell v. Texas*, 392 U.S. 514, 536 (1968); *Leland v. Oregon*, 343 U.S. 790, 800 (1952) ("[k]nowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions") (footnote omitted).[13] Similarly, a leading scholar re-

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[13] *Leland* held that due process allowed a State to require a defendant to prove insanity, even beyond a reasonable doubt, where the mental-disorder evidence was already available for consideration in determining whether the State had met its burden of proving all *mens rea* elements beyond a reasonable doubt.

ported in 1967 the common practice of entirely omitting the "nature and quality" language from jury charges or "treat[ing it] as adding nothing to the requirement that the accused know his act was wrong." Goldstein, at 50. Key commentary on the ALI standard's differences from *M'Naghten* do not even mention that the ALI standard states its cognitive prong solely in terms of criminality or wrong, without separate reference to the "nature and quality" of the act. *ABA Standards* p. 7-297; *Mentally Disabled & Law* 711-12; *1982 Position Statement* at 2. And the ABA and American Psychiatric Association have endorsed legal standards that use only "wrongfulness" language, without separate mention of a "nature and quality" inquiry, while adopting "appreciate" in place of "know" to emphasize the breadth of the inquiry. *See 1982 Position Statement* at 6; *ABA Standards* p. 7-294. The logic is plain: "if the accused did not know the nature and quality of his act, he would have been incapable of knowing it was wrong." Goldstein, at 50-51.

Despite the removal of the "nature and quality" language from the statutory standard in 1994, the Arizona courts in this case appear to have construed the present statute in accordance with the foregoing logic. The Arizona Court of Appeals, in rejecting Clark's constitutional attack, specifically said: "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" Pet. App. A at 16 (¶ 38). Even the trial court, in making an insanity finding *only* about knowledge of wrong, expressly considered "evidence" that Clark knew that he was shooting a police officer, though it is also the case that the trial court did not actually make a specific finding to that effect. Resp. App. F at 4. On its face, moreover, nothing about the Arizona insanity-defense statute precludes the sensible, broad understanding under which a *separate* component addressing the "nature and quality" would be unnecessary to comport with constitutional standards.

**B.** On the other hand, if Arizona were to give its knowledge-of-wrong statute a narrow meaning, somehow to allow a finding of knowledge of wrong when the defendant has no rational understanding of what he is doing, then a real question about compatibility with our legal tradition would arise. For example, a defendant may appreciate that it is wrong to kill a household pet, but if he believes, due to a psychotic disorder, that he is killing a pet when he in fact is killing his sister, his awareness that it is wrong to kill a pet could hardly establish that he rationally appreciated the wrongfulness of his actual act. On any scale of blameworthiness consistent with our legal traditions, there is a difference of such magnitude as to break the required connection of criminal punishment to the underlying reality of moral responsibility. If Arizona were to take too narrow a view of knowledge of wrong, therefore, or if it declared a broad meaning and then forbad consideration of relevant expert mental-disorder evidence about the defendant's understanding of the nature and quality of his act, a serious due process issue would be presented.

Even in that circumstance, however, the constitutional defect could become harmless. *If* (as we argue above) the trier were already required to consider the mental-disorder evidence and upon such consideration found the knowing killing of a police officer proved by the State, the State will have proven rational knowledge of the "nature and quality" of the act, even narrowly understood, and that component could not be at issue when applying the insanity defense. What would remain regarding insanity would be whether the defendant, as a result of a mental disorder, did not know the wrongfulness of that act, whose nature and quality he has already been proven to have appreciated. Under any definition, that is what Arizona has left in its insanity defense.

## CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 30 2006

No. 05-5966

IN THE

# Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner*,

v.

THE STATE OF ARIZONA,

*Respondent*.

**On Writ of Certiorari to the Arizona Court of Appeals**

## BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC OF THE UNITED STATES, THE NATIONAL DISABILITY RIGHTS NETWORK, AND THE BAZELON CENTER FOR MENTAL HEALTH LAW, IN SUPPORT OF PETITIONER

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IN THE

# Supreme Court of the United States

No. 05-5966

ERIC MICHAEL CLARK,

*Petitioner*,

v.

THE STATE OF ARIZONA,

*Respondent*.

**On Writ of Certiorari to the Arizona Court of Appeals**

## BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC OF THE UNITED STATES, THE NATIONAL DISABILITY RIGHTS NETWORK, AND THE BAZELON CENTER FOR MENTAL HEALTH LAW, IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI* [1]

*Amici* are national organizations of mental disability professionals and citizens (more fully described in the Appendix) with longstanding concerns about constitutional and statutory protections for people with mental disabilities in the criminal justice system.

[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

## SUMMARY OF ARGUMENT

It is now clearly established that the vast majority of people with mental retardation, developmental disabilities, or mental illness do not engage in criminal behavior. They live peacefully and productively in their communities. But when someone with a serious mental disability *is* charged with a criminal offense, the disability is very frequently relevant to the question of the individual's personal culpability.

Anglo-American legal tradition has long acknowledged the relevance of such disabilities to criminal cases. Although the formulations have varied over time, both courts and legislatures have recognized a disability-based defense. Most of the reported cases involve defendants with mental illness, but every formulation of the defense also encompasses individuals who have mental retardation.

The strength and durability of this tradition mean that its core principle is reflected in the Due Process Clause. While the States have considerable latitude in shaping their criminal laws, they must offer a defendant a meaningful opportunity to demonstrate the relevance of mental disability to the criminal charge. Failure to afford that opportunity is tantamount to transforming such crimes into strict liability offenses for these defendants.

States can satisfy the requirements of Due Process in more than one way. But, at a minimum, they must consider mental disability evidence offered by the defense to rebut any presumption about *mens rea*, and must provide a meaningful opportunity to establish the disability's relevance to the defendant's personal culpability.

## ARGUMENT

### I. ANGLO-AMERICAN LEGAL TRADITION RECOGNIZES THAT MENTAL LIMITATIONS CAN AFFECT AN INDIVIDUAL'S CULPABILITY FOR CRIMINAL ACTS.

#### A. Mental Disability Has Traditionally Occupied A Central Role In Assessing A Defendant's Criminal Responsibility.

The relationship between mental disability and criminal culpability has been acknowledged since days of antiquity,[2] and in a variety of formulations was accepted by both canonical and civil law into the Middle Ages.[3] The one major interruption in the acceptance of the exculpatory significance of mental disability occurred during the period of society's focus on witchcraft.[4] The sentiment against punishing per-

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[2] Plato noted that crimes could be committed "in a state of madness or when affected by disease, or under the influence of extreme old age, or in a fit of childish wantonness, himself no better than a child. And if this be made evident to the judges elected to try the cause, on the appeal of the criminal or his advocate, and he be judged to have been in this state when he committed the offence, he shall simply pay for the hurt which he may have done to another; but he shall be exempt from other penalties, unless he have slain some one, and have on his hands the stain of blood. And in that case he shall go to another land and country, and there dwell for a year . . . ." Plato, *Laws* 248 (B. Jowett trans., 3d ed. 1892). *See* Trevor J. Saunders, *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology* 217 (1991). (Plato was not always so charitable, from a modern perspective, to people with disabilities. *See Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).)

[3] "In the matter of criminal responsibility, both ecclesiastical and secular courts routinely exonerated defendants judged to be insane or mentally retarded." Daniel N. Robinson, *Wild Beasts and Idle Humours: The Insanity Defense from Antiquity to the Present* 71 (1996); *see also* Naomi D. Hurnard, *The King's Pardon for Homicide Before A.D. 1307*, at 159-60 (1969).

[4] Robinson, *supra* note 3, at 74-75 ("Indeed, the very theory of witchcraft effectively denied defendants access to the insanity defense, though the defense was otherwise available.").

sons whose acts were occasioned or substantially affected by mental disability became more securely settled with the rejection of the notion that mental disability resulted from demonic possession, and with the growing recognition of mental illness as a medical phenomenon.[5]

The implementation of a complete defense based on mental disability has been controversial over time,[6] and remains so today.[7] The fact that it has endured periodic assaults is testament, not to its fragility, but rather to the enduring character of its basic principle. Whether the conceptualization of an "insane" defendant was expressed in terms of analogy to a

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[5] *See generally* Nigel Walker, *Crime and Insanity in England: Volume One—The Historical Perspective* (1968); Roy Porter, *Mind-Forg'd Manacles: A History of Madness in England from the Restoration to the Regency* (1987); Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (1995). One historian, however, has suggested that while legal recognition of insanity as a defense developed earlier, the phenomenon of medicalization and public acceptance of insanity as a *medical* phenomenon gained widespread acceptance somewhat later than the Victorian period. Roger Smith, *The Boundary Between Insanity and Criminal Responsibility in Nineteenth-Century England*, in *Madhouses and Mad-Doctors and Madmen: The Social History of Psychiatry in the Victorian Era* 363, 364 (Andrew Scull ed., 1981).

[6] *See, e.g.*, Charles E. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry and Law in the Gilded Age* 53-56 (1968) (noting that popular debate during the trial of President Garfield's assassin sometimes referred to "the insanity dodge"). *See generally* Mary Ann Jimenez, *Changing Faces of Madness: Early American Attitudes and Treatment of the Insane* (1987); Norman Dain, *Concepts of Insanity in the United States 1789-1865*, at 43-52 (1964).

[7] Henry J. Steadman, Margaret A. McGreevy et al., *Before and After Hinckley: Evaluating Insanity Defense Reform* 1-10 (1993). It should be noted that some of the same public skepticism extends to other legal issues involving individuals with mental disability, notably incompetence to stand trial. *See, e.g.*, Henry J. Steadman, *Beating a Rap?: Defendants Found Incompetent to Stand Trial* 4-6 (1979).

"wild beast,"[8] or inquiry whether an individual had the mental capacity to perform rudimentary tasks like "counting twenty pence,"[9] whether the individual could distinguish right from wrong,[10] whether he had the capacity to control his behavior in the face of an irresistible impulse,[11] or whether his actions were the "product" of mental disability,[12] there has remained in our law a core belief that some defendants are so affected by mental disability that it would be fundamentally unjust to convict and punish them.

The inquiry into the antecedents that constitute our legal traditions encompasses the full scope of Anglo-American legal history. But in interpreting the Due Process Clause, the understanding in the mid-Nineteenth Century carries particular significance because of the light it may shed on the perspectives in this country at the time the Fourteenth Amendment was written and ratified. It is clear that American medical and legal professionals were generally conscious

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[8] See, for example, Mr. Justice Tracy's jury instruction in *Rex v. Arnold*, 16 S. Tr. 695, 764-65 (H.L. 1724). *See generally* Anthony Michael Platt & Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and its Relation to Theories of Criminal Responsibility*, 1 J. Hist. Behav. Sci. 355 (1965).

[9] *See, e.g.*, Anthony Fitz-herbert, *The New Natura Brevium of The Most Reverend Judge, Mr. Anthony Fitz-herbert* 532 (rev. & corrected ed. 1666). *See* Henry Weihofen, *Mental Disorder as a Criminal Defense* 53-54 n.6 (1954) (suggesting that while it was discussed in terms of criminal responsibility, the example was intended as a diagnostic description of idiocy rather than a precise formula for a criminal responsibility).

[10] *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843). *See generally* Richard Moran, *Right From Wrong: The Insanity Defense of Daniel McNaughtan* (1981).

[11] *See, e.g., Parsons v. State*, 2 So. 854, 865 (Ala. 1887); *Regina v. Oxford*, 173 Eng. Rep. 941, 950 (H.L. 1840).

[12] *See, e.g., State v. Jones*, 50 N.H. 369, 382 (1871); *State v. Pike*, 49 N.H. 399, 408 (1870); *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).

of the issue, and that there was widespread awareness of the *M'Naghten* case, albeit with spirited debate about its adequacy as a legal test.[13] The most widely noted American publication on the subject was Isaac Ray's *Treatise on the Medical Jurisprudence of Insanity*,[14] later editions of which criticized the *M'Naghten* test as too narrow in scope.[15]

Debates on the scope and implementation of the insanity defense continued into the Twentieth Century.[16] While there

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[13] *See, e.g.*, Rosenberg, *supra* note 6, at 102-03. The first use of *M'Naghten* by an American appellate court appears to be Chief Justice Shaw's opinion in *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 502 (1844). *See generally* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227 (1966) (use of the right-and-wrong test in American courts predated *M'Naghten*).

[14] Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (reprint 1962) (1st ed. 1838). First published in 1838, the treatise had been cited extensively in the *M'Naghten* trial. Bernard L. Diamond, *Isaac Ray and the Trial of Daniel M'Naghten*, 112 Am. J. Psychiatry 651 (1956). Ray's treatise was in its fourth edition (1860) at the time of the 39th Congress.

[15] Ray, *supra* note 14, app. I, at 343-50 (5th ed. 1871). Other American medical authorities of the era agreed. *See generally*, E.C. Spitzka, *Insanity: Its Classification, Diagnosis and Treatment* 23 (reprint 1973) (1887) ("that cannot be sanity in law which is insanity in science").

[16] There were isolated, ultimately unsuccessful efforts to abolish the defense early in the last century. Those statutory efforts were declared unconstitutional by state courts. *See State v. Strasburg*, 110 P. 1020 (Wash. 1910); *id.* at 1027 (Rudkin, C.J., concurring) ("There is little analogy between [a nondisabled defendant's mistake of fact] and *the idiot, the imbecile, or the person who is insane* to the degree defined by our statute. It will be conceded that the Legislature has a broad discretion in defining and prescribing punishment for crime, but, broad and pervading as the police power is, it is not without constitutional limitations and restraints, *and we can scarcely conceive of a valid penal law which would punish a man for the commission of an act which the utmost care and circumspection on his part would not enable him to avoid.*") (emphasis

were isolated efforts at the state level to abolish the defense,[17] and unsuccessful efforts at the federal level in the 1980s,[18] it cannot be disputed that some form of recognition that mental disability may undermine or diminish criminal liability is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Patterson v. New York*, 432 U.S. 197, 202 (1977) (internal citations omitted).[19]

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added); *Sinclair v. State*, 132 So. 581 (Miss. 1931); *id.* at 584 (Ethridge, J., concurring) ("So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English speaking countries that it has become a part of the fundamental laws thereof.").

[17] *See* Idaho Code Ann. § 18-207 (1982); Kan. Stat. Ann. § 22-32-20 (1996); Mont. Code Ann. § 46-14-101 (1979); Utah Code Ann. § 76-2-305 (1983). *But see Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) ("[L]egal insanity is a well-established and fundamental principle of the law of the United States. It is therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions.").

[18] *But cf.* Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1984) (changing the test for insanity but preserving the defense).

[19] The fact that the insanity defense (or a successful *mens rea* defense) is controversial does not resolve the Due Process inquiry. Other criminal law protections that this Court has recognized as fundamental are also potentially controversial, at least after a result unfavorable to the prosecution in high-profile cases (for example, the privilege against self-incrimination, state-provided counsel for indigents, proof beyond a reasonable doubt at trial, suppression of the fruits of unreasonable searches or seizures, or the prohibition on double jeopardy).

Interpretations of both the Due Process Clause and the Eighth Amendment include examination of our legal traditions, but do so in somewhat different ways. Eighth Amendment analysis includes both inquiries into historical antecedents, *e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 406-08 (1986), and into contemporary social consensus, *Roper v. Simmons*, 543 U.S. __, 125 S. Ct. 1183, 1192-94 (2005). As a result, Eighth Amendment examination of legislative enactments is a means of gauging the existence and evolution of contemporary standards of decency. By contrast, the "rooted in the traditions and conscience" inquiry in Due Process analysis looks to the centrality and continuity of traditional protections.

### B. The Reduced Culpability Of Individuals With Mental Retardation Has Long Been Recognized.

Although the cases have focused on defendants with mental illness, there has also been recognition, at least in theory, that the same principle applies to individuals whose impairment results from mental retardation. At common law, particularly with regard to issues like conservatorship and property, distinctions were drawn between people with mental illness and people with mental retardation. *See Heller v. Doe*, 509 U.S. 312, 326 (1993). These appear to have derived, at least in part, from different expectations about whether an individual might become mentally competent at some time in the future. *See* William Blackstone, 1 *Commentaries* *296. Categorical distinctions of this type, however, were not generally made part of the criminal law.

None of the early formulations of the insanity defense excluded people whose impairment we would now identify as mental retardation. Fitz-herbert's "count twenty pence" test was clearly focused on intellectual impairment. Blackstone counseled that "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." William Blackstone, 4 *Commentaries* *24. The *M'Naghten* test's reference to mental disease *or defect* expressly included individuals with mental retardation. Other formulations, including the Model Penal Code and the Insanity Defense Reform Act of 1984, have also adopted the "defect" category as a parallel to mental disease.[20]

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*Cooper v. Oklahoma*, 517 U.S. 348, 356-63 (1996). Thus, while sharp public controversy may be relevant to Eighth Amendment analysis, it is less so for Due Process.

[20] Model Penal Code § 4.02 (official drft. & rev. cmts. 1985); Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1984). *See also McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962) (applying the "product" test of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), to

Even in the era of our history that featured the most virulent antipathy toward people with mental retardation, there was some recognition of their reduced moral culpability. When leading authorities in the field of mental retardation were sounding the alarm of an imagined threat posed to society,[21] many also acknowledged the effect of the disability on an individual's moral responsibility.[22]

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defendants with mental retardation). The fact that the scope of the categories of "idiots," "imbeciles," "morons," and other archaic (and now offensive) terms may not be precisely coextensive with the modern definition of mental retardation, *see Penry v. Lynaugh*, 492 U.S. 302, 332-33 (1989), does not reduce the relevance of these early cases to the constitutional questions of whether our legal traditions recognize the relevance of a defendant's disability to culpability, and whether there is a right to present evidence about the disability to rebut a presumption of a culpable mental state.

[21] *See, e.g.*, James W. Trent, Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* 131-83 (1994); Leila Zenderland, *Measuring Minds: Henry Herbert Goddard and the Origins of American Intelligence Testing* (1998).

[22] *See, e.g.*, A.F. Tredgold, *Mental Deficiency (Amentia)* 306 (1st ed. 1908) ("I am quite certain that in persons suffering from amentia a diminished power of control is so commonly present, and such an essential part of their mental condition, that a grave injustice may be done if this be not taken into account."); V.V. Anderson, *Feeblemindedness as Seen in Court*, 1 Mental Hygiene 260, 263 (1917) ("Not only were they incapable of measuring up to the educational or economic standards met by their normal fellows, but they were equally incapable of conforming to the standards of conduct of the community in which they lived."); Wm. Ray Griffin, *Criminal Responsibility of the Mentally Deficient*, 20 Southern Med. J. 918, 919 (1927) ("[M]orons and high grade imbeciles and the lower types of defectives are only imitators and act impulsively, doing the thing that appeals to them most strongly, or that they are urged or persuaded to do. They are unable to take the problem and weigh it from the standpoint of right and wrong and act accordingly."); George L. Wallace, *Are the Feebleminded Criminals?*, 13 Mental Hygiene 93, 96 (1929) ("There is little doubt that most of the feebleminded who become criminals do so by accident rather than by intention."). See also Herbert C. Parsons's (exquisitely titled) *The Learned Judge and the Mental*

While the insanity defense, at least in modern times, has been used less frequently by defendants with mental retardation than in cases involving defendants with mental illness,[23] it remains at least theoretically available.[24] But its infrequent use in mental retardation cases emphasizes the crucial importance of recognizing the right of defendants with mental retardation to offer rebuttal evidence on the issue of *mens rea*.

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*Defective Meet—What Then?*, 12 Mental Hygiene 25, 30 (1928) ("Given a crime sufficiently atrocious and a popular resentment sufficiently inflamed, and the measurings of mental responsibility go to discard.").

The most widely cited, and to modern eyes perhaps the most notorious, authority of the alarmist period was Henry H. Goddard. *See, e.g.*, Henry H. Goddard, *The Kallikak Family: A Study in the Heredity of Feeble-mindedness* (1912). While Goddard campaigned tirelessly for eugenic sterilization and segregation of people with mental retardation, he also acknowledged that they often lacked responsibility for their criminal acts. *See, e.g.*, Henry H. Goddard, *A Brief Report on Two Cases of Criminal Imbecility*, 19 J. Psycho-Asthenics 31, 33 (1914) ("He may be able to say that it is wrong as a mere matter of verbal repetition, repeating what he had heard others say, but as for having a realizing sense of the wrongfulness of the deed, I am satisfied that no imbecile or moron of his grade has any such knowledge.").

[23] It is not completely clear why this is true. Although *amici* have found no relevant statistics, it is conceivable that there may be somewhat more frequent diversion from prosecution for some defendants who have mental retardation, particularly where the impairment is manifestly severe. It may also be that some defense counsel fail to detect or correctly identify their clients' mental impairment. And the fact that the defense is labeled "insanity," a term connoting mental illness, may prove to be a barrier, in some way, to obtaining recognition of its applicability to a defendant with mental retardation.

[24] *See, e.g., In re Ramon M.*, 584 P.2d 524, 529-30 (Cal. 1978). Over the years, there have been a few cases in which courts precluded defendants who appear to have had mental retardation from raising the defense. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 432-41 (1985), for a fuller discussion of these early cases.

## II. DUE PROCESS REQUIRES STATES TO RECOGNIZE THE RELEVANCE OF MENTAL DISABILITY TO THE ASSESSMENT OF CRIMINAL GUILT.

### A. The Constitution Imposes Modest Limits On The States' Wide Latitude In The Area Of Criminal Justice.

Out of respect for the proper role of the States in our federal system, this Court has allowed them considerable latitude in defining crimes and enacting procedures for their adjudication. *Martin v. Ohio*, 480 U.S. 228, 232 (1987); *Patterson*, 432 U.S. at 201 ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."). This leeway granted to the States reaches into such areas as evidentiary rules, *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983), allocating burdens of persuasion, *Medina v. California*, 505 U.S. 437 (1992), and identifying the acts they choose to criminalize and the elements of those crimes, *Montana v. Egelhoff*, 518 U.S. 37, 57 (1996) (Ginsburg, J., concurring in the judgment).

*Amici* recognize that one of the areas in which the Court has shown deference to state legislative judgments involves the treatment of individuals with mental disabilities. In the criminal context, the Court has allowed a State to impose a heavy burden of persuasion on a criminal defendant pleading insanity, and refrained from requiring one particular formulation of the insanity defense on all the States. *Leland v. Oregon*, 343 U.S. 790, 798-801 (1952).[25] On occasion,

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[25] In the doctrinally distinct (but practically related) area of competence, the Court also allowed a State to impose the burden of persuasion on the defendant in establishing incompetence to stand trial. *Medina v. California*, 505 U.S. 437 (1992). *But see Cooper v. Oklahoma*, 517 U.S. 348 (1996) (unconstitutional to impose burden on defendant at the elevated level of "clear and convincing evidence").

individual Justices of this Court have noted the question of whether the insanity defense is constitutionally required. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 97-98 (1992) (Kennedy, J., dissenting) (observing that several States had abolished the defense). In addition, States have been afforded considerable latitude in designing a system of civil commitment for those acquitted by reason of insanity. *See generally Jones v. United States*, 463 U.S. 354 (1983).

However, the freedom of States to shape their criminal laws is not limitless. The Constitution does impose some limits on both the substantive and procedural aspects of state criminal laws. Some of these limitations derive from the relatively explicit provisions of the Bill of Rights. Others are grounded in the more general wording of the Due Process Clause of the Fourteenth Amendment and the Punishments Clause of the Eighth Amendment. When interpreting these potentially more expansive texts, the Court has grounded (and thus limited) its supervision of the States by looking to the historical experience of Anglo-American legal tradition and to basic principles of fundamental fairness. *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996).

Particularly in interpreting the Due Process Clause, historical tradition has a prominent position. In evaluating procedural protections, the Court has only intervened when the State's law "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (internal citations omitted). Principles of federalism require a similar focus on, and examination of, our legal traditions and experience in evaluating novel alterations of a State's substantive criminal laws.

When state laws alter the traditional approaches to the culpability of defendants with serious mental disabilities, historical guides can be identified in two separate lines of doctrinal development. The first is the history of addressing

the culpability of defendants with such disabilities. The second line of development is the persistence of our commitment to the principle that a finding of guilt for a serious crime cannot be based on strict liability and must be supported by a conclusive demonstration of personal culpability.

### B. Strict Liability For Serious Offenses Is Strongly Disfavored.

The core principle of grounding guilt in an individual defendant's personal culpability is a broad and durable foundation of our criminal law. More than half a century ago, Justice Jackson articulated the fundamental commitment to that principle:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . . Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

*Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (footnotes omitted) (quoting William Blackstone, 4 *Commentaries* *21).

This bedrock principle retains its force, even with the enactment of modern regulatory laws that sometimes impose penalties without proof of individual culpability. The creation of offenses, often in the borderland between criminal law and administrative law, *see Morissette*, 343 U.S. at 252-54, does not erode the central importance of individual guilt in traditional crimes. First, strict liability offenses are most frequently limited to violations of law that are punished at

relatively modest levels.[26] In addition, they often involve conduct of an actor who is capable of knowing and has reason to know of the risk to the public posed by his conduct. *See, e.g., Staples v. United States*, 511 U.S. 600, 607 (1994); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943). These factors contribute to what Chief Justice Burger described as "their generally disfavored status." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

The generally cabined exception, found in regulatory offenses, has left intact the basic principle for the most serious crimes: personal culpability remains a central requirement. As Justice Jackson explained:

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. . . . The unanimity with which [the courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms

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[26] For example, the Model Penal Code limits strict liability offenses to those punishable by a fine. "Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed." Model Penal Code § 2.05 cmt. 1, at 283 (official drft. & rev. cmts. 1985) (footnote omitted). *See also Staples v. United States*, 511 U.S. 600, 616-19 (1994). In most modern legislation, strict liability offenses carry "a relatively light penalty—generally of the misdemeanor variety." Wayne R. LaFave, *Criminal Law* 273 (4th ed. 2003).

> as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought *to protect those who were not blameworthy in mind* from conviction of infamous common-law crimes.

*Morissette*, 342 U.S. at 251-52 (footnotes omitted) (emphasis added).

This longstanding tradition has guided this Court's efforts in cases like *Morissette* and *Staples* to interpret statutes where there is legislative ambiguity about the required *mens rea*. The fact that the Court has seldom had occasion to address the *constitutionality* of strict liability statutes results, in large part, from the fact that legislatures have generally been quite reluctant to impose liability without fault for traditional, major crimes that involve both public censure and heavy penalties.

But when a State seeks to impose its most severe criminal penalties on defendants whose culpability may have been substantially impaired by mental disability, serious Due Process questions must be addressed.[27]

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[27] The principal focus of the Court in this area has been the Due Process Clause of the Fourteenth Amendment. But convicting a defendant who has a substantial mental disability without affording opportunity to consider the possibly exculpatory implications of that disability also raises issues of cruel and unusual punishment under the Eighth Amendment. *Cf. Robinson v. California*, 370 U.S. 660, 661 (1962); *Lambert v. California*, 355 U.S. 225, 231 (Frankfurter, J., dissenting) (1957). Like the Due Process Clause, the Punishments Clause has a dual focus on historical practices and contemporary notions of fairness. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 406 (1986) ("In addition to considering the barbarous methods generally outlawed in the 18th century, . . . this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the funda-

### C. Depriving Defendants Of An Opportunity To Demonstrate The Relevance Of Their Mental Disabilities To Criminal Guilt Constitutes Strict Liability.

The relevance of mental retardation and other serious mental disabilities to criminal culpability has been universally recognized. As this Court has observed, individuals with mental retardation "have a reduced ability to cope with and function in the everyday world." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). While the vast majority of individuals with this intellectual impairment do not engage in criminal behavior, it is always relevant to assessing culpability when criminal conduct is charged. "[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal." *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). *See also id.* at 318 ("Because of their impairments, . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.").

Similarly, other serious developmental disabilities and mental illness are equally crucial to an understanding of conduct that violates the criminal law. *See Tennard v. Dretke*, 542 U.S. 274, __, 124 S. Ct. 2562, 2572 (2004) ("Evidence of significantly impaired intellectual functioning is obviously evidence that might serve as a basis for a sentence less than death.") (internal quotations omitted). *See generally* Stephen

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mental human dignity that the Amendment protects."); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits '[e]xcessive' sanctions. '. . . [I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'") (internal citations omitted). While there are doctrinal differences in the interpretation of the two constitutional texts, *see supra* note 19, their common core principles suggest that either approach would yield similar analysis.

P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1564-65 (1998) (a majority of surveyed jurors found mental illness and extreme mental or emotional disturbance to be potentially persuasive mitigating circumstances); James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 Crim. L. Bull. 299, 317-19, 327-30 (1994) (extreme emotional disturbance and mental illness are among the mitigating factors most frequently specified by legislatures).

In both capital and noncapital cases, mental retardation and other mental disabilities can be essential considerations in assessing an individual's criminal culpability for two reasons. First is the obvious effect that such a disability can have on an individual's understanding of his conduct and the ability to control that conduct.

Second, individuals who have the disabilities did not voluntarily choose to be affected by them. While the etiology of mental retardation varies widely, and in a considerable number of cases cannot be identified with specificity, virtually no one who has the disability bears any responsibility for acquiring it. *See generally* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 123-37 (10th ed. 2002). Similarly, other developmental disabilities and major mental illnesses are seldom conditions that the affected individual has chosen or sought. *See generally* Michael Gelder, Dennis Gath et al., *Aetiology*, in *Oxford Textbook of Psychiatry* 74-104 (3d ed. 1996).[28]

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[28] This stands in sharp contrast to voluntary intoxication. *See Montana v. Egelhoff*, 518 U.S. 37, 57 (1996) (Ginsburg, J., concurring in the judgment); *id.* at 76 (Souter, J., dissenting). The individual's presumed responsibility for his own intoxication means that the exclusion of consideration of such evidence can be attributed to that morally culpable act. In addition, exclusion of intoxication evidence may be thought to have some deterrent effect. *See Egelhoff*, 518 U.S. at 49-50 (plurality opinion

*Amici* do not suggest that the presence of a mental disability will always be dispositive of cases involving serious criminal charges. Like evidence of mental illness offered in mitigation in a capital trial, rebuttal evidence of a defendant's mental disability on the question of *mens rea* will sometimes be persuasive and sometimes it will not. Some, perhaps many, defendants with mental retardation and other mental disabilities will, notwithstanding their disability, have formed the requisite mental state for the serious crime with which they are charged. When that proves to be true, they may be guilty of the crime for which they are prosecuted (and the only remaining relevance of their disability may be at sentencing). By contrast, when the legislature has decided that a particular crime requires a particular mental state, and where a defendant does not have that mental state, our traditions and shared sense of justice will not allow us to pretend that the mental state was present.

### D. Defendants Are Entitled To An Opportunity To Present Relevant Mental Disability Evidence.

As noted earlier, this Court has allowed substantial latitude to the States in determining the shape of their criminal justice systems. The constitutional limitations that constrain that latitude in cases involving defendants with mental disabilities are relatively modest in scope, but crucial in practice. They

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per Scalia, J.). Reasonable minds can and do disagree about the moral calculus of excluding exculpatory consideration of voluntary intoxication. For example, in capital cases, voluntary intoxication is among the least persuasive of mitigators in the minds of jurors. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1565 (1998). *See generally* LaFave, *supra* note 26, at 471-85, and authorities cited therein. There is no comparable culpability in having mental retardation. *See generally* Paul H. Robinson, *Criminal Law* 273 (1997). Nor can exclusion of evidence of the effect of a defendant's disabling condition somehow create a disincentive to have the disability.

are addressed below, starting with the narrowest resolution of the instant case and proceeding to the broadest.[29]

### 1. The Constitution requires that evidence of mental limitations be considered in assessing a defendant's *mens rea.*

Where the legislature has established a particular mental state as a material element of a crime, and where the prosecution has offered evidence in support of its view that the defendant had that mental state, the defendant is entitled to present rebuttal evidence to show that he did not have that mental state.[30]

The opportunity to be heard and to present a defense is protected both by the procedural meaning of the Due Process Clause and the Sixth Amendment's guarantee of a fair trial. "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on [an issue] . . . central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the

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[29] In the view of *amici*, this case can be resolved narrowly, granting Petitioner relief from the denial of the opportunity to present rebuttal evidence to the prosecution's inferential assertion of *mens rea*. If that is correct, it becomes unnecessary for this Court to address the broader constitutional issues presented in the Petition for Certiorari. *See Parker v. Los Angeles County*, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."). However, since the broader issues are included in the Questions Presented, *amici* will offer their perspective on them briefly.

[30] The right to consideration of such evidence is particularly crucial when the charge involves what some States denominate as "specific intent" crimes, *see generally United States v. Bailey*, 444 U.S. 394, 405 (1980), and other States identify as "intentional" crimes, *see, e.g., State v. Bridgeforth*, 750 P.2d 3, 5 (Ariz. 1988). However, *amici* believe that the right to offer mental disability evidence on the issue of *mens rea* should be recognized for *all* defendants prosecuted for serious offenses.

basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (internal quotation omitted).

Evidence of the effect of mental disability on a defendant's conduct can be relevant in two distinct and equally important ways. The first category consists of cases in which the proffered evidence regarding a defendant's mental illness or mental retardation rebuts the prosecution's assertion by showing that the defendant did not harbor that mental state *because the mental disability rendered him incapable of forming it.* This is the category of cases that has most frequently been addressed by the courts.

The second category of cases involves a defendant whose disability may not have rendered him *incapable* of forming the requisite mental state, but where the proffered evidence provides *an alternative explanation* for behaviors that might otherwise be interpreted as incriminating by the trier of fact. While this category has been addressed less frequently by appellate decisions, it is equally vital. Triers of fact (both juries and judges) often interpret a defendant's behavior in the light of their expectation of how people normally behave in a given circumstance, or how they normally react to a particular event. In forming these interpretations, the triers of fact often evaluate a defendant's actions by what *they* would do if confronted by similar circumstances.

But a common feature of mental illness or mental retardation is that the individual who has that disability may not act or respond in the same way other individuals would. Individuals with mental illness and, in different ways, people with mental retardation may sometimes behave in an unexpected, seemingly illogical manner.[31] When that behavior is

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[31] *See* Johnny L. Matson & Virginia E. Fee, *Social Skills Difficulties Among Persons with Mental Retardation*, in *Handbook of Mental*

sufficiently bizarre, laypeople may, even without the assistance of expert testimony, identify it as a manifestation of the mental illness. Yet in other cases, its relation to a mental disability may be less apparent. Expert testimony may be crucial in assisting the trier of fact in determining whether the behavior under examination connotes the same mental state that it would if the actor were an individual who did not have the mental disability.[32]

In each category, the State can offer no valid justification for prohibiting the consideration of such evidence. The state legislature has chosen to make a particular mental state an indispensable element of the prosecution's case. Having done so, the State cannot then permit the prosecution to offer its own evidence while denying the trier of fact the opportunity to consider contrary relevant, probative evidence that, if believed, would demonstrate that a defendant did not have that mental state. The result of the Arizona rule is to permit

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*Retardation* 468-78 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991). The risk of misinterpreting perceptions, reactions, and behavior can be exacerbated when the individual has both mental retardation and mental illness. *See* Johannes Rojahn, Johnny L. Matson et al., *Relationships Between Psychiatric Conditions and Behavior Problems Among Adults with Mental Retardation*, 109 Am. J. Mental Retardation 21, 31 (2004).

[32] Evidentiary rules no longer limit expert testimony to information "not within the common knowledge of the average layman." *Compare Bridger v. Union Ry.*, 355 F.2d 382, 387 (6th Cir. 1966), *with* Fed. R. Evid. 702. *See generally Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993). *See also* Ariz. R. Evid. 702. Nonetheless, expert testimony can be crucially helpful when, in its absence, a trier of fact would be likely to misinterpret facts by relying on intuitions from common experience that may be misleading regarding a defendant with a mental disability. *See, e.g., United States v. Pino*, 606 F.2d 908, 919 (10th Cir. 1979) (psychiatric testimony that a person in shock would appear drunk). *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* 620-21 (3d ed. 2003); Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* § 13.02[2] (student 7th ed. 2005).

various other kinds of *non*disability rebuttal evidence regarding *mens rea* but to exclude mental disability evidence. This is, in essence, a form of discriminatory treatment that is unwarranted by any legitimate public policy.[33]

Refusal to permit consideration of a defendant's mental disability can transform serious crimes into *de facto* strict liability offenses for individuals whose mental functioning was substantially impaired. For example, such a rule would allow a finding that a defendant acted "knowingly" when his mental impairment rendered him incapable of "knowing" whatever the offense specified.[34]

The American Bar Association's position on this issue is persuasive. "Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be

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[33] A general desire to increase the rate of convictions cannot, of course, justify excluding exculpatory evidence for this one sub-class of defendants. (The State is free to change the required mental state for a crime, but such a change would apply to all defendants equally.) Similarly, a desire to incapacitate defendants with mental disabilities is insufficient justification for excluding exculpatory evidence. In most cases, a determination that the defendant did not possess the statute's required *mens rea* will not result in acquittal. Even if a defendant lacks the *mens rea* for a particular charged crime, they will generally remain convictable of lesser included offenses. Am. Bar Ass'n, *Standards for Criminal Justice* § 7-6.2 cmt. at 7-314 (adopted 1984). And if a defendant's disability is so severe that he or she lacks the *mens rea* for *any* offense, the State has other options. As in the case of defendants who successfully raise the insanity defense, States may seek their incapacitation under special commitment statutes. *See generally Jones v. United States*, 463 U.S. 354 (1983); Am. Bar Ass'n, *Standards for Criminal Justice* §§ 7-7.1 to 7-7.11 (adopted 1984).

[34] Lack of knowledge of commonly known facts is a characteristic of many criminal defendants who have mental retardation. *See Mentally Retarded Criminal Defendants*, *supra* note 24, at 431.

admissible." Am. Bar Ass'n, *Standards for Criminal Justice* § 7-6.2 (adopted 1984).[35] The Commentary notes that this Standard "incorporates a simple evidentiary principle based on a rule of 'logical relevance.' Except in strict liability cases, criminal adjudication always involves determining whether a defendant possessed the *mens rea* for an offense. Therefore, evidence, including properly qualified expert testimony, that tends to show a defendant did or did not have the mental state for a charged offense should be admissible." *Id.* cmt. at 7-313.

Exclusion of such relevant exculpatory evidence deprives a defendant who has a serious mental disability of the procedural protections of a fair trial, and also subjects that defendant to punishment that is the equivalent of strict liability—conviction and punishment of a serious offense without personal culpability. Thus, both the procedural and substantive meanings of the Due Process Clause are implicated.

**2. Whether in terms of an insanity defense or in some other form, the States must provide a meaningful opportunity to demonstrate the relevance of a defendant's mental disability.**

The most constitutionally challenging issue is the status of the insanity defense itself. The difficulty of the issue derives from the tension between two powerful constitutional principles. The first is this Court's practice of generally deferring to choices made by the States in the shaping of criminal liability under their own laws. But the second, of at least equal gravity, is the longstanding tradition in Anglo-American law of recognizing the potentially exculpatory effect of

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[35] *See also* Model Penal Code § 4.02(1) (official drft. & rev. cmts. 1985) ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.").

the fact that a defendant had a serious mental disability. As noted earlier, *amici* believe that this history constitutes a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Patterson*, 432 U.S. at 202.

While the core principle that mental disability may reduce a defendant's personal culpability so significantly that it requires acquittal has "deep roots in our common-law heritage," *see Medina*, 505 U.S. at 446, the precise contours of its implementation have varied over time, and from State to State. But those variations do not, and cannot, undermine the basic principle that has been recognized in our law for centuries.

How, then, is this basic principle to be enforced in the modern constitutional context?

One possible constitutional approach would identify the longest-standing and most widely-adopted formulation of the insanity defense as a *minimum constitutional floor*, below which the States would be prohibited from descending. The most obvious candidate for implementing such a constitutional rule would be the formulation in *M'Naghten*. Such a constitutional holding would permit States to experiment with the formulation (and procedural implementation) of the insanity defense, while requiring that they provide to defendants at least its minimum protections.

An alternative to that constitutional approach would be to focus on the functionality of a State's protection of defendants with serious mental disabilities, rather than on its form or wording. Such analysis would have two components.

The first part of this approach would begin with the traditions developed under Anglo-American law over time. If a State adopts a formulation of a mental disability defense grounded in our historical traditions, such as the basic *M'Naghten* test or that of the Model Penal Code, it would be

deemed to be protected by a *constitutional safe harbor*, protecting its substantive law from federal constitutional challenge.[36]

If, however, a State chooses to adopt a more restrictive formulation of the defense, or to abolish it altogether, a constitutional challenge might occasion a more searching inquiry into whether the laws of the State provided adequate practical protection to the interests of defendants whose culpability was impaired by serious mental disabilities. Part of that inquiry might include judicial exploration of the actual level of availability of *mens rea* defenses in criminal trials in the State.[37]

To deny defendants with mental disabilities an opportunity to explain their disabilities' relevance imposes a draconian regime of conviction without personal culpability—essentially strict liability—and does so without any of the justifications generally offered for strict liability in those areas of law where it is tolerated. There is no justification in our historical traditions, or in contemporary principles of fundamental fairness, that would warrant such a result.

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[36] This would obviously protect the vast majority of the States today, since almost all have adopted either the Model Penal Code approach or a formulation of the *M'Naghten* test that includes its basic contours. Similarly, it would encompass the formulation of *M'Naghten* codified in the federal Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1984). It would also protect States that adopt the basic principles of the insanity defense but change its terminology. *See, e.g., Pouncey v. State*, 465 A.2d 475 (Md. 1983).

[37] *See generally* Peter Heinbecker, *Two Years' Experience under Utah's Mens Rea Insanity Law*, 14 Bull. Am. Acad. Psychiatry & L. 185, 190 (1986) (suggesting the importance, in the initial experience under the statute, of bargaining for insanity pleas); Henry J. Steadman, Margaret A. McGreevy et al., *The Impact of Abolishing the Insanity Defense in Montana*, in *Before and After Hinckley: Evaluating Insanity Defense Reform* 121-37 (1993).

## CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the Arizona Court of Appeals be reversed.

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## APPENDIX

***The American Association on Mental Retardation*** ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

***The Arc of the United States*** (formerly known as the Association for Retarded Citizens of the United States), through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

***The National Disability Rights Network*** ("NDRN"), formerly the National Association of Protection and Advocacy Systems ("NAPAS"), is the membership association of protection and advocacy ("P&A") agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

***The Bazelon Center for Mental Health Law*** is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's

work involves efforts to remedy disability-based discrimination through enforcement of the Americans with Disabilities Act.

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SUPREME COURT, U.S.
FILED
MAR 6 - 2006
OFFICE OF THE CLERK

No. 05-5966

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In The
Supreme Court of the United States

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Eric Michael Clark,

Petitioner,

v.

State of Arizona,

Respondent.

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**On Writ of Certiorari to the Arizona Court of Appeals**

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# AMICUS CURIAE BRIEF OF THE CITIZENS COMMISSION ON HUMAN RIGHTS

**In support of Respondent**

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## I – INTEREST OF AMICUS

Amicus Citizens Commission on Human Rights[1] (CCHR) is a non-profit, public benefit organization dedicated to investigating and exposing psychiatric violations of human rights.

CCHR's members include prominent doctors, lawyers, artists, educators, civil and human rights representatives and professionals who see it as their duty to expose and help abolish physically damaging practices in the field of mental healing. With 250 chapters in 34 countries, CCHR seeks to accomplish these stated aims with like-minded individuals and groups, including politicians, teachers, healthcare professionals, government and law enforcement officers and the media.

CCHR's expertise lies in the study of unscientific diagnosis and labelling and damaging treatment of individuals by the psychiatric profession, including the deleterious effects thereof upon the individual and on our society as a whole. On behalf of thousands of its members and in the interest of persons whose rights and freedoms will not otherwise be heard, CCHR

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1. Letters from the parties consenting to the filing of amicus briefs have been lodged with the Clerk of the Court. In accordance with Rule 37.6, amicus states that no counsel for any party authored or participated in any manner in this brief. No entity or person, aside from amicus, made any monetary contribution to the preparation or submission of this brief.

offers an entirely different perspective than those of the parties or other amici.

## II – SUMMARY OF ARGUMENT

This amicus brief addresses in part, the effect upon our judicial system of the burgeoning increase in the purported identification of alleged psychiatric illnesses in recent decades, many of which describe common human behavior and which "illnesses" or "disorders" lack scientific validity. This creation of mental illnesses has resulted in inaccurate, unreliable purchased testimony in criminal matters, and ever expanding diminution of responsibility for intentional criminal acts simply by mischaracterizing the accused as insane.

It is CCHR's position that the State of Arizona acted within its authority to simplify the insanity defense to protect its citizens, to adjudicate responsibility for intentional criminal acts and to avoid the current parade of irrelevant psychiatric testimony confusing to juries and unnecessary to the determination of *mens rea*.

## III – ARGUMENT

The parties to this action have fully set forth the factual history of the case, the general law respecting the history of the insanity defense and the important states-rights issues raised by

this Court's acceptance of certiorari. Accordingly, none of these matters will be repeated except briefly where necessary to give context to the arguments.

Forbearance from the imposition of severe criminal penalties against one who, while having committed a violent crime was unaware of his transgression, is exercised by every state in the union. Indeed, if the purpose of punishment is to encourage members of the society to obey the laws of the society, there is little reason to punish one for commission of an act when he was honestly incapable of understanding that he had committed wrong.[2]

Thus, the earliest formulation of the insanity defense in *M'Naghten's* case, 10 Clark & Fin. 200, 210, 8 Eng.Rep. 718, 722 (H.L. 1843) held that to satisfy the requirements for a successful insanity defense, it must be clearly proved that, at the time of the commission of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Contrary to the arguments of the petitioner, these two phrases from M'Naghten can easily be read to mean exactly the

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2. Amici does not here address the relatively small categories of laws which, if violated, nevertheless can potentially result in criminal penalties.

concept that the State of Arizona sought to achieve: that a guilty person will not be punished for the commission of a crime requiring *mens rea* if he did not know what he was doing was wrong. One hundred and fifty years of agile-minded defense attorneys creating new arguments, the myriad factual circumstances that have occurred in criminal trials, and the thousands of courts which have sought to interpret that Rule to such circumstances have necessarily lead to confusion.

The State of Arizona, having experienced the same sorts of defense gambits and psychiatric testimony that every federal and state court has experienced, chose to exercise its constitutional authority to simplify and make workable the insanity defense. By so doing, Arizona chose to exclude, where possible, purchased testimony of unusual purported "disorders" that have baffled judges and juries within its borders.

This brief focuses on why the insanity defense has *become* so complex; and how it has become so far removed from its central purpose of forbearance of punishment of persons who lacked *mens rea*.

### A. The Introduction of Organized Psychiatry Into the Determination of Right vs. Wrong

At the time of *M'Naghten's* case, psychiatry as a profession did not exist. There were what was known as "alienists" and some practitioners focusing upon mental

disturbances, but in general, a jury of one's peers was deemed the appropriate arbiter of whether an accused was so afflicted that he was unable to differentiate between right and wrong.

In the 1930's, the practice of psychiatry was still little known, little used, and little taught, with only a handful of universities conferring degrees therein. However, the leaders of the relatively new practice aggressively sought, through legislation, promotion of their claimed expertise and society's need for their services, to expand its numbers and its influence.

Leaders of the international psychiatric associations and the American Psychiatric Association later proclaimed their intention to change the moral standards of our society, and bring about "the re-interpretation and eventually eradication of the concept of right and wrong," as the proper objectives for psychiatry and "effective psychotherapy." In a series of public lectures in 1945, G. Brock Chisholm, who, with John Rawlings Rees was co-founder of the World Federation for Mental Health (WFMH), bluntly told their peers: "If the race is to be freed from the crippling burden of good and evil it must be psychiatrists who take the original responsibility." [3]

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3. G. Brock Chisholm, "The Reestablishment of Peacetime Society: The Responsibility of Psychiatry," William Alanson White Memorial Lectures, Second Series, 23 Oct. 1945, *Psychiatry: Journal of Biology and Pathology of Interpersonal Relations*, Vol. 9, No. 1, Feb. 1946, p. 9.

Nowhere was purported psychiatric expertise more accepted than in American courtrooms, and nowhere were its doctrines more dramatic than in determining the scope of responsibility for criminal acts.

### B. Establishment of a Psychiatric Manual and its Use in Judicial Proceedings

In accordance with the policies and goals addressed above, the American Psychiatric Association established a "manual" or dictionary to be utilized in the classification of supposed mental ills. The manual resulted in the identification of numerous "mental disorders," thus permitting the diminution of personal responsibility by identifying a large number of reasons why persons were not personally responsible for their criminal conduct: they had an "illness," "mental disease"or "disorder" that caused the criminal act and which was outside of the individual's volitional control.

The first version of this dictionary, published by the APA in 1952, was denominated the *Diagnostic and Statistical Manual of Mental Disorders*, or colloquially, the "*DSM*." The *DSM* listed and categorized 112 supposed mental disorders by several committees of psychiatrists supposedly knowledgeable in the area. It should be noted at the outset that what has been called a "mental disease" or a "mental illness" has never been shown to be either an actual disease or illness. An actual disease has

measurable and palpable pathological abnormality, and are the diseases treated by physicians. This is not so with so-called mental diseases. No blood test, radiological scan or physical examination has ever revealed the existence of any mental disease or "disorder."

Although the *DSM* did not define what a "mental disorder" actually was, it leant substantial credibility to the concept that at least there were vast numbers of mental disorders which psychiatrists, as purported experts in the filed, could readily identify and classify. Because the prevailing rule in determinations of insanity as a criminal defense was based on whether a person who committed a crime possessed an overwhelming mental illness, the expanding number of mental disorders offered a potpourri of tools to so convince the jury.

Thus, in the period of percolation of the new manual, the District of Columbia Circuit ruled on the case of *Durham v. United States*, 214 F.2d 862 (D.C. Cir.1954), broadening the ability of psychiatrists to provide expert testimony on issues substantially beyond the scope of *M'Naghten*. In *Durham*, the defendant, a man with a long criminal and psychiatric history, was tried and convicted of housebreaking despite his insistence that he was not guilty by reason of insanity. The Court reversed, holding that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

*Durham*, 214 F.2d at 874-75. (footnote omitted).

This "product" test as it came to be known, was eventually overruled in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir.1972) (en banc), in favor of a hybrid rule influenced by *Durham* which was proposed by the American Law Institute. The ALI model rule held that a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Model Penal Code § 4.01(1) (Final Draft 1962) (quoted in *United States v. Hansen*, 701 F.2d 1078, 1080 n. 3 (2d Cir.1983)).

The *Durham* decision and subsequent hybrid ALI rule established solidly the need for psychiatric testimony in criminal proceedings and set the precedent for the admission of psychiatric testimony in the rest of the world to explicate the supposed nature of insanity. With claimed expertise in the characterization of conduct as mental illness (or not), psychiatric witnesses were, after *Durham*, permitted to utilize a broad and complex test beyond the ken of lay jurors which substantially diverged from the central concept of the accused's ability to differentiate between right and wrong.

Indeed, the *Durham* decision triggered a steady increase of psychiatric courtroom testimony in the U.S., which as shown

below, has resulted in a massive erosion in the justice system's ability to provide predictable and equitable justice.

Psychiatrists became the arbiters of culpability for criminal deeds based not upon the defendant's volitional decision to act or forbear from acting, but rather, whether the accused possessed a purported "mental disorder" that the psychiatrist utilized to excuse anti-social conduct, regardless of intent.

Only three years later, in 1957, Justice Fortas, at the time a criminal defense attorney, assessed the impact of the *Durham* decision stating: "...[T]he law has recognized modern psychiatry....Its importance is that it is a charter, a bill of rights, for psychiatry and an offer of limited partnership between criminal law and psychiatry." [4]

### C. Expansion of the *Diagnostic and Statistical Manual* Further Confused Sanity Adjudications

The *DSM* was not based upon medical tests, studies or scientific experiments. It was predicated entirely upon the opinions of psychiatrists appointed to committees to address and list the criteria for classifying a person as mentally ill.[5] "Unlike

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4. *American Journal of Psychiatry,* 113:577-582, 579 (Jan 1957)

5. Caplan, P., *They Say You're Crazy: How the World's Most Powerful Psychiatrists Decide Who's Normal.* Addison-Wesley

medical diagnoses that convey a probable cause, appropriate treatment and likely prognosis, the disorders listed in *DSM-IV* are terms arrived at through peer consensus" – literally by a vote by APA committee members – and designed largely for billing purposes. [6] In other words, there is no objective science to it.

Like any assertion based upon consensus of a committee in any venue or discipline, the criteria for diagnosis of each mental disorder was ambiguous and therefore easily susceptible to mere opinion.

Subsequent revisions of *DSM* after the original 1952 version only broadened the scope of what was considered mental illness. In 1968, *DSM II* was published. There, the listing of supposed mental disorders grew from the 112 classified in 1952, to 163 purported mental disorders. The section on *DSM II* addressing the disorder claimed to afflict petitioner in the instant case, schizophrenia, conceded that, "[e]ven had it tried, the [schizophrenia] Committee could not establish agreement about what this disorder is; it could only agree on what to call it."[7]

The situation worsened in subsequent editions, with the

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Pub.Co., p. 85-110 (1995)

6. Dr. Tana Dineen, Ph.D., *Manufacturing Victims*, Third Edition, (Robert Davies Multimedia Publishing, Quebec, Canada, 2001), p. 86;

7. *DSM II*, p. ix.

1980 version, denominated *DSM III,* which swelled the list to 224 mental disorders. The American populace was allegedly becoming more and more severely mentally ill in many different ways – according to the APA. In 1987, the American Psychiatric Association published a further revised *DSMIIR* in support of its members' business, now asserting the existence of a whopping 253 mental disorders.[8]

**D. DSM Disorders Are Not Actual Diseases**

In evident justification for the burgeoning number of claimed mental disorders, *DSM III* conceded, in its Introduction under the heading, "Basic Concepts," that "[a]lthough this manual provides a classification of mental disorders, there is no satisfactory definition the specifies precise boundaries for the concept 'mental disorder' ..." *DSM III* goes on to admit that it does not assert that these identified "disorders" are actually mental illnesses, much less that the disorders are either out of the control of the individual or that they emphatically ordain his conduct in a fashion that absolves him from responsibility therefrom. Rather, it states,

> In DSM-III each of the mental disorders is

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8. Lobbying efforts of the APA with insurance companies required that numbered *DSM* diagnoses accompany billings for psychiatric services. Thus, the business aspect of the ever-expanding number of psychiatric illnesses served an obvious purpose beyond purported academic discussion.

> conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of functioning (disability). In addition, there is *an inference* that there is a behavioral, psychological, or biological dysfunction, and that the disturbance is not only in the relationship between the individual and society.[9]

The fourth edition, *DSM IV*, was published by the APA in 1994, and balloons the number of mental disorders "found" to *374 disorders*.[10] And, like its previous editions *DSM* continues to concede that its profession remains unable even to define the term mental disorder, noting that the term "mental disorder" continues to appear in the volume "because we have not found an appropriate substitute."[11] It also notes, "Moreover, although this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder."[12] This further admission is significant, because in recent years, the *DSM* and its authors and publishers from the

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9. *Diagnostic & Statistical Manual for Mental Disorders - III*, American Psychiatric Association, 1980, p. 5-6 (emphasis added).

10. *Id.*

11. *Id.*, p. xxi.

12. *Id.*, p. xxi.

American Psychiatric Association have been under substantial pressure both to justify this burgeoning list of purported disorders, and indeed, to explain the lack of science in their classifications and testimony arising therefrom.

Notwithstanding the inference that the identified disorders presented actual illnesses, psychiatric practice has never demonstrated the existence of any actual physical illness associated with the myriad listings of mental disorders.

Thus, the APA authors state quite clearly in the various editions that they have no idea what a mental disorder is; they can't define it nor can they distinguish between mental disorders, and no mental disorder; and they have no scientific proof of the *existence* of the "disorders."[13] However, these failings have presented no barrier to diagnosis to the "expert" seeking to absolve violent criminals from responsibility for their acts. To the contrary, such ambiguities permitted psychiatric diagnoses of the existence of mental illnesses which – in the view of the retained psychiatric witness – may be sufficient to excuse an intentional crime as an impulse beyond the purported ability of

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13. The year *DSM IV* was published, Norman Sartorious, later president of the APA (1996-1999), declared at a meeting of a congress of the Association of European Psychiatrists, "The time when psychiatrists considered that they could cure the mentally ill is gone. In the future the mentally ill have to learn to live with their illness." Lars Boegeskov, "Mentally Ill Have to Have Help – Not to Be Cured," *Politiken*, September 19, 2004.

the accused to suppress.

As noted by Professors Herb Kutchins (California State University Sacramento) and Stuart Kirk (UCLA), authors of *Making Us Crazy: DSM: the Psychiatric Bible and the Creation of Mental Disorders*,[14] mental disorders described in *DSM* were created in accordance with the opinions and beliefs of the managers of the publication:

> First, you must appreciate that the notion of mental disorder is what social scientists call a construct. Constructs are abstract concepts of something that is not real in the physical sense that a spoon or motorcycle or cat can be seen and touched. Constructs are shared ideas, supported by general agreement. Democracy, alienation, conservatism are constructs, abstract ideas that have some degree of shared meaning within some groups Mental illness is a construct, a shared abstract idea. ... be aware that constructs such as generalized Anxiety Disorder are held together by agreements and that agreements change over time. The category itself is an invention, a creation. It may be a good and useful invention, or may be a confusing one. DSM is a compendium of constructs. And, like a large and popular mutual fund, DSM's holdings are constantly changing as the manager's estimates and beliefs about the values of those holdings change.

*Id.*, p. 23-24.

Because these constructs are whimsical, common behavior of humans can, at the whim or opinion of the

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14 Simon & Schuster (1997)

psychiatric observer, be viewed as either entirely normal or an entirely abnormal mental disorder.

For example, the *DSM* dramatically changed in accordance with pressure to conform to "politically correct" ideas. In *DSM II*, homosexuality was the first of 10 specifically identified categories in section 302, "Sexual deviations." In 1968, protestors from the Gay Liberation Front demonstrated at the AMA convention and in 1970 to 1973 at APA conventions, and otherwise lobbied against inclusion as a mental disorder. [15] *DSM III* eliminated the characterization, replacing it with a diagnosis only for a disorder for those purportedly "troubled" with their homosexual impulses. Finally, after further lobbying efforts and protests in *DSM III*, all such references were deleted in their entirety. [16]

In the opposite fashion, lobbying efforts caused the supposed mental disorder, Post Traumatic Stress Disorder to be *included* into the *DSM*. The original version contained "Gross Stress Reduction," the diagnosis used for "battle fatigue" as was attributed to distressed soldiers during World War II. However, the term was deleted in *DSM II*, to the argued detriment of some Vietnam War veteran groups seeking disability payments for former soldiers. Thus, after a period of intense lobbying, a new

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15. Kutchins & Kirk, p. 63, 65.

16. *Id.*, p. 78-79.



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diagnostic criteria was inserted in *DSM III* literally in negotiations with veterans groups who demanded their own category: Post Traumatic Stress Disorder.[17]

As another example of how common activities can be deemed mental illnesses in *DSM*, consider the plight of a lawyer who worries about the quality and acceptance by the Court of his upcoming oral argument. A review the target attorney's apprehension against the broad criteria of at least the following *DSM IV* categories could quickly and easily be made to "diagnosis" whether the distressed attorney was suffering from a mental disorder or one of the numerous "sub" disorders, and if so, which one:

* Panic Disorder with Agoraphobia,[18] *DSM IV*, p. 396-402
* Panic Disorder without Agoraphobia, *id.*, p. 402-403
* Agoraphobia without History of Panic Disorder, *id.* 403
* Specific Phobia (replacing the former Simple Phobia), *id.*, p. 405-406
  - Natural Environment Type (e.g., fear of storms, water, heights), *id.*, p. 406
  - Situational Type (e.g., fear of tunnels, bridges, flying, elevators, [perhaps courtrooms], etc.), *id.*, p. 406
  - "Other" Type ("cued by 'other' stimuli"), *id.* p. 407

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17. *Id.*, p. 101-115.

18. Agoraphobia is defined as a fear of being in difficult or helpless situ

* Social Phobia (fear of a social or performance situation [perhaps courtrooms]), *id.*, p. 411
* Obsessive-Compulsive Disorder
* Generalized Anxiety Disorder
* Anxiety Disorder Due to a Medical Condition, *id.* p. 394
  - With Generalized Anxiety, *id.* p. 393-94
  - With Panic Attacks, *id.* p. 394
  - With Obsessive-Compulsive Symptoms, *id.* p. 393
* Substance-Induced Anxiety Disorder, *id.* p 439-443
  - With Generalized Anxiety, *id.* p. 440
  - With Panic Attacks, *id.* p.440
  - With Obsessive-Compulsive Symptoms, *id.* p. 440
  - With Phobic-Symptoms, *id.* p. 440

*Id.*, Kutchins & Kirk, p. 25-26.

Or perhaps, if a psychiatrist was retained to label the apprehensive attorney with any of the above listed disorders but was unable to make a neat fit, then one of the catch-all disorders listed in *DSM* could be employed, such as the ubiquitous "Anxiety Disorder Not Otherwise Specified." *Id.* p. 444

A psychologist who attended a DSM committee meeting presided over by the manual's leading architects, psychiatrist Robert Spitzer, reported, "[T]hey were having a discussion for a criterion about Masochistic Personality Disorder and Bob Spitzer's wife, [a social worker and the only woman on Spitzer's

side at that meeting] says, "I do that sometimes," and he says, "Okay, take it out." You watch this and you say, "Wait a second, we don't have a right to criticize them because this is a "science?" [19]

As reported in detail by another of the APA committee members who participated in the creation on *DSM IV*, the process more closely resembles political jockeying of the language of a legislative bill to gain consensus than any true scientific endeavor. [20]

One might assume that the advance of science in essentially all disciplines in recent years would bespeak a growing ability of the psychiatric profession to understand and identify the mental illnesses about which thousands of their number testify in criminal settings throughout the country. Not so, according to three of the APA's primary authors of *DSM IV*. As might be expected, another *DSM* version is under preparation. And a book about it was recently published by the APA entitled *A Research Agenda For DSM - V*. The authors unashamedly admit that there remains no etiological foundation for any of the purported mental disorders listed in any of the prior versions of

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19. Caplan, P. *They Say You're Crazy: How the World's Most Powerful Psychiatrists Decide Who's Normal.* Addison-Wesley Pub.Co., p. 91. (1995)

20. *Id.*, p. 80-115.

the book:

> The DSM-III diagnostic system adopted a ... approach to diagnosis ... around hypothetical but unproven theories about etiology in favor of a descriptive approach, in which disorders were characterized in terms of symptoms that could be elicited by patient report, direct observation and measurement... From the outset, however, it was recognized that the primary strength of a descriptive approach was its ability to improve communication between clinicians and researchers, not to establish its validity.
>
> Disorders in DSM-III were identified in terms of syndromes, symptoms that are observed in clinical populations to covary [sic] together in individuals. It was presumed that, as in general medicine, the phenomenon of symptom covariation could be explained by a common underlying etiology... Once fully validated, these syndromes would form the basis for the identification of standard, etiological homogenous groups that would respond to specific treatments uniformly.
>
> In the more than 30 years since the introduction of ... DSM-III, the goal of validating these syndromes and discovering common etiologies has remained elusive.[21]

Similarly, the APA put out a press release in 2003 in response to criticism of the lack of science to its diagnoses, but which conceded, "In the absence of one or more biological markers for mental disorders, these conditions are defined by a

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21. Kupfer, First & Regier, *A Research Agenda For DSM - V*, American Psychiatric Association, 2002, p. xviii.

variety of concepts." [22]

In other words, the leaders of the psychiatric profession list these many alleged illnesses not because they are palpable illnesses for which any etiology or physical cause van be found, but rather, to make it easier to communicate with each other.

Unfortunately, these same purported experts are the gatekeepers utilized in the judicial system to make complex determinations in many states, whether the criminal defendant is responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." ALI Model Penal Code § 4.01(1) The discipline of psychiatry is simply *unable* to do that – notwithstanding the numerous experts permitted to swear the opposite in courts across the nation. This inability and the commensurate lack of ethical standards by the supposed experts has resulted in countless outlandish defenses for half a century – which the State of Arizona justifiably wishes in the future to avoid.

Examples of criminal defenses from *DSM* categories which any logical citizen would consider bizarre include:

* Telephone scatalogia (302.90): A psychiatrist argued that

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22. "American Psychiatric Association Statement on Diagnosis and Treatment of Mental Disorders." Release 03-39, September 25, 2003.

the president of American University after being arrested for making obscene phone calls, suffered from paraphilia (perverted sexual behavior). [23]

* Sleepwalking disorder (307.46): This diagnosis was used successfully in the defense of a man charged with the murder of his wife's parents, after he drove 15 miles in the middle of the night to commit the act.[24]

* Somatoform disorder (330.81): A university professor was ordered to pay his adult daughter $1500 per month until he retires because she is unable to work due to a "disorder" that makes her focus on her physical disability.

While even the 374 categories of purported mental disorders presently located in *DSM IV* should be enough to fulfil the needs of the defense bar and its willing and inventive psychiatric witnesses, even more disorders are periodically created to escape criminal culpability. For example:

* Clerambault-Kandinsky syndrome: A psychologist testified that a judge of New York State, charged with extortion and threatening to kidnap the teenage daughter of his ex-lover, "was manifesting advanced symptoms of CKS," described as

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23. Dineen, Dr. Tana, *Manufacturing Victims: What the Psychology Industry if Doing to People*, Robert Davies Publishing, p. 213 (1966)

24. *Id.*

involving an irresistible lovesickness or "erotomania." [25]

* Cultural psychosis: A defense lawyer in Milwaukee argued that a teenage girl charged with the shooting and killing of another girl during an argument over a leather coat suffered from "cultural psychosis" which caused her to think that problems are resolved by gunfire.[26]

* Urban psychosis: Man who grew up in a violent family in a tough neighborhood in Milwaukee who had been assaulted as a child and gang-raped in prison, stabbed a sexual partner to death after an alleged flash-back to the rape.[27]

* Urban survival syndrome: Teenage defendant argued that "urban survival syndrome" caused him to gun down two other teenagers with whom he was feuding. The accused had admitted killing the victims, but asserted he had been threatened by them with a shotgun a week earlier.[28]

* Fan Obsession Syndrome: First invoked by psychiatrist

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25. *Id.*

26. *Id.*

27. Falk, P.J., "Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication and Black Rage." *North Carolina Law Review*, 74 N.C.L.R.731 (1996)

28. Hagen, M., *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of the American Justice System*, Regan Books, 1997, p. 165

Park Elliot Dietz in 1992 to defend Robert Bardo who murdered actress Rebecca Schaeffer. [29]

* Gone with the Wind Syndrome: Used by rape experts to explain why rapists believe sex has to be spontaneous and done after some resistance on the part of the woman.[30]

* Super Jock Syndrome: Which formed a part of the O.J. Simpson trial. Dr. Susan Forward, the therapist who treated Simpson's murdered wife, Nicole, testified for the prosecution that the likelihood of Simpson's guilt was based on her theory that athletes, especially superstars, are prone to violence when frustrated. [31]

* Accounting Anxiety: A psychologist claimed he suffered from "accounting anxiety" to explain why he had violated financial and tax laws. [32]

* Moral Insanity: In 1998, psychiatrist William Cone was

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29. "Yes, but is he crazy? Forensic experts help jury decide if defendant is madman or criminal." *The Washington Times*, March 4, 1992.

30. "The Rape Debate: Is There an Epidemic of Sexual Assaults? Or Just a Wave of Politicized Hysteria? From Bedroom to Courtroom, the Rules Are Changing." *Los Angeles Times*, October 17, 1993.

31. "Simpson Case Could Serve as Warning" *Indianapolis Recorder*, August 13, 1994

32. "Psychologist Blamed Accounting Anxiety" *Nettavisen*, April 29, 2003.

convicted of sexual and deviate sexual assault of two female patients. Cone claimed that he suffered from "moral insanity" brought on by his "obsessive preoccupation with work, power and perfection...." [33]

One can readily see the wisdom of a State's exclusion of such assertions by an accused to escape criminal culpability, with the statutory limitation imposed in Arizona that, "Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct." Arizona Penal Code § 13-502(A)

While the above list of "mental illnesses" utilized to escape criminal responsibility is outlandish, many of the newly created illnesses have become household words and are rarely questioned, although they should be. One is "Battered Woman Syndrome." The battered woman syndrome has increasingly been invoked in trials in which a wife or girlfriend of the victim is charged with murdering a spouse, by *inter alia,* setting fire to his bed as he lies passed out, or shooting him as he sleeps.

Yet this type of crime could hardly be one in which the

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33. "133-Year Prison Sentence For Cone," *Daily Quill*, 11 Feb. 1998.

woman would not understand the nature of her conduct, planning and executing a murder with gasoline, and doing it when she was reasonably assured that the alleged wife-beater would not be able to defend himself. Moreover, laws of every jurisdiction provide substantial protection to women from an allegedly battering male, through a judicial protective order enforced by the police or criminal prosecutions. Presumably perceiving state-mandated remedies as inadequate, the battered woman takes matters into her own hands, and – bluntly – commits murder. Yet, one law review article reviewing this class of cases found that in one third of the cases in which the defense was presented, the accused was acquitted. [34]

Chief among the well-accepted newer syndromes utilized to escape criminal culpability, is Post Traumatic Stress Disorder addressed above, or as it is now widely known, "PTSD." *DSM III* characterized PTSD as the development of specific symptoms following a psychologically traumatic event that is beyond the range of usual human experience. PTSD is not limited to veterans; anyone may allegedly be susceptible, as *DSM III* suggests, such as victims of traumatic events like rape, assault, airplane crashes, and torture. *See, DSM III,* p 236-238.

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34. Stark, E., "Symposium on Reconceptualizing Violence Against Intimate Partners: Critical Issues: Re-Presenting Women Battering: Women Syndrome to Coercive Control." *Albany Law Review* 58:973

One law review article addressing the issue found widespread use of PTSD among Vietnam veterans accused of a crime, and noted its effectiveness as a defense:

> Although PTSD has received a mixed reception in the legal community, it has achieved some success as a legal defense. Vietnam veterans have used PTSD successfully as an insanity defense against charges of murder, attempted murder, kidnaping, and drug smuggling. PTSD has also been used to mitigate sentences in convictions for crimes such as drug dealing, manslaughter, assault with intent to commit murder, and even tax fraud. In light of the relative rarity of the insanity defense in general and the unlikelihood of its success, the success of PTSD as an insanity defense is intriguing.

29 *Wm. & Mary L. Rev.* 415, 422-23 (1988)

The law review article provides helpful tips to the attorney considering the PTSD defense in inflaming the emotions of the jurors to buy the defense, including that, "[f]ilm footage of Vietnam may prove useful in assisting the trier of fact to appreciate the trauma of combat fully." *Id.*, at 437.

Perhaps the best proof of the disingenuous nature of psychiatric opinion testimony concerning sanity is the fact that experts are so readily available for flatly opposing positions.

In a 1962 article in the *Northwestern Law Review*, psychiatrist Alfred Baur cited a case where his hospital received a patient for a three-month observation before trial. Baur and

two colleagues concluded that he had "no mental disorder." The court, however, appointed two private psychiatrists to give their expert opinion. One announced that the patient was a paranoid schizophrenic; the other said he was in a paranoid state. Come the trial, the hospital psychiatrists testified that the patient was not insane, while the two court-appointed psychiatrists insisted that he was. The final irony in this situation was, as Baur reported, was that the jury found the man 'not guilty by reason of insanity' and 'still insane' and then committed him to the hospital which had just found him without mental disorder. [35]

Jeffery Harris, Executive Director of the U.S. Attorney General's Task Force on Violent Crime, observed, "What amazes me is that in any trial I've ever heard of, the defense psychiatrist always says the accused is insane, and the prosecuting psychiatrist always says he's sane. This happened invariably, in 100% of the cases, thus far exceeding the laws of chance. You have to ask yourself, 'What is going on here?' The insanity defense is being used as a football...and quite frankly, you'd be better off calling Central Casting to get 'expert psychiatric testimony' in a criminal trial." [36] In this regard, as

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35. Alfred K. Baur, M.D., "Legal Responsibility and Mental Illness," *Northwestern Univ. Law Review*, Vol. 57, No. 1, Mar.-Apr. 1962.

36. Carol A. Gallo, "The Insanity of the Insanity Defense," *The Prosecutor*, Spring 1982, p. 6.

noted by author Thomas Szasz, M.D.:

> It is unlikely that toxicologists would be tolerated in courts of law if one would observe that he found a large quantity of arsenic in the body of a deceased person, and another stated that he found by the same operation none. Yet this sorry spectacle is commonplace in regard to psychiatric findings." [37]

## IV - CONCLUSION

According to *DSM-IV*, when its mental disorder descriptions "are employed for forensic purposes, there are significant risks that diagnostic information will be misused and misunderstood." [38]

Yet, every jurist has observed the amorphous testimony of psychiatric experts and contradictions between the witnesses regarding psychiatric testimony and the resulting confusion therefrom. As noted in a dissenting opinion by future Chief Justice Warren Burger, in *Blocker v. U.S.*, 288 F.2d 853, 860 (D.C.Cir. 1961) concerning the lack of a scientific basis for psychiatrists' conflicting testimony, "No rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound

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37. Thomas Szasz, M.D., "Psychiatric Expert Testimony—Its Covert Social Function," *Psychiatry, Journal for the Study of Interpersonal* 20, No. 3, August 1957, 314.

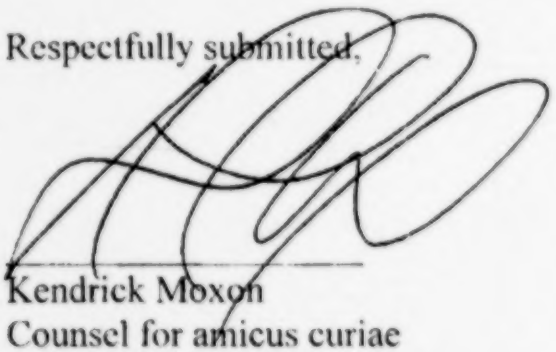
38. *DSM IV*, p. xxiii.

disagreement about what those terms mean."

In the 54 years since the *DSM* was published, and the 52 years since the *Durham* case opened the door wide to the introduction of psychiatric testimony on insanity issues, there has not only been no advance – the field is muddled beyond redemption. The State of Arizona having devised a means to provide predictable criminal justice while honoring the rights of its citizens and sufficiently preserving the rights of criminal defendants, its laws should be found to be constitutional and should be preserved.

Dated: March 5, 2006

Respectfully submitted,



Kendrick Moxon
Counsel for amicus curiae
CITIZENS COMMISSION
ON HUMAN RIGHTS

PROOF OF SERVICE

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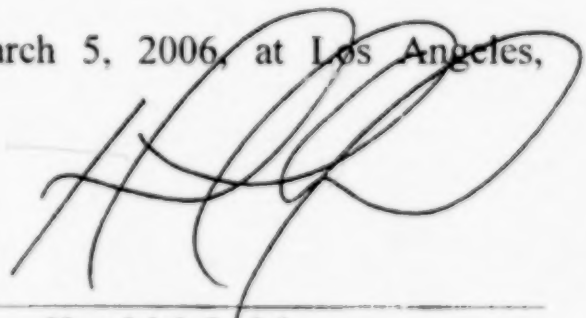
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Executed on March 5, 2006, at Los Angeles, California.



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No. 05-5966

IN THE

# Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner*,

*v.*

STATE OF ARIZONA,

*Respondent.*

*ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS*

## BRIEF OF THE STATES OF MASSACHUSETTS, ALABAMA, ARKANSAS, COLORADO, DELAWARE, HAWAII, INDIANA, MICHIGAN, MONTANA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA AND TEXAS AS AMICI CURIAE IN SUPPORT OF RESPONDENT


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## QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the states to provide a complete criminal insanity defense to persons other than those who "did not know the criminal act was wrong."

2. Does the Due Process Clause of the Fourteenth Amendment require states to permit evidence of a mental disorder short of insanity under state law to negate *mens rea*?

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## INTEREST OF THE AMICI

Amici states have a paramount interest in ensuring that they maintain their traditional prerogative to define the substantive content of their criminal law. Deciding who should be excused from condemnation for their criminal acts due to mental illness has long been one of the most difficult and controversial questions of the criminal law, and our federal system entrusts those decisions to the states. A ruling invalidating Arizona's insanity defense statute on the basis urged by Petitioner here, however, would call into serious question the validity of the majority of state statutes defining substantive criminal insanity defenses. In addition to preserving their sovereignty over their own criminal law, the states have substantial interests in assuring that those guilty of crimes are justly punished, that those who suffer from mental illness that renders them dangerous to others are prevented from causing harm while they receive treatment and care, and that citizens continue to respect the criminal justice system and view its outcomes as just.

## STATEMENT

It is undisputed both that Petitioner shot and killed Flagstaff, Arizona, Police Officer Jeffrey Moritz during a traffic stop, and that at the time he killed Officer Moritz, Petitioner suffered from a mental disease—paranoid schizophrenia. At his bench trial, Petitioner raised the affirmative insanity defense provided by Arizona law: "A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Ariz. Rev. Stat. § 13-502(A). The trial court, after hearing extensive expert psychiatric testimony from both parties, agreed that Petitioner suffered from a mental disease, but concluded that he had not proved by clear and convincing

evidence that the disease caused him not to know that shooting Officer Moritz was wrong. Petitioner does not challenge that determination in this Court.

Rather, this petition relates to two separate arguments regarding the scope of Arizona's insanity defense that Petitioner pressed unsuccessfully in the state courts. First, Petitioner argued that § 13-502 is unconstitutionally narrow in scope because it does not provide a defense to a defendant who did not know the "nature and quality" of his act. The Arizona Court of Appeals rejected this argument, holding that the substantive definition of the insanity defense was not governed by the federal Due Process Clause, and alternatively that the "nature and quality" test was simply redundant to the statutory defense: "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" Pet. App. at A16.

Petitioner also argued that the trial court unconstitutionally failed to consider his mental disease evidence in determining whether he had the requisite state of mind to commit first degree murder. The court of appeals, noting that the trial court had not prevented Petitioner from introducing any mental illness evidence and that Petitioner had introduced no evidence to negate *mens rea*, other than the evidence that he introduced to prove insanity, rejected the argument. The court concluded that to rule for Petitioner in these circumstances it would have to ignore the Arizona Supreme Court's holding that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *State v. Mott*, 931 P. 2d 1046, 1051 (Ariz. 1997). Since it was bound by *Mott*, the court of appeals affirmed the conviction.

## SUMMARY OF ARGUMENT

1. Petitioner asks this Court to declare Arizona's insanity defense statute unconstitutional because it fails to explicitly state that those who do not know the "nature and quality" of their acts are insane. This position is only supportable if the Fourteenth Amendment imposes on the states the precise formulation of the insanity defense announced to the House of Lords in 1843 after the controversial acquittal of Daniel M'Naghten. But this particular expression of the insanity rule is not so deeply rooted in Anglo-American law that it is a fundamental principle incorporated in the Due Process Clause. To the contrary, the *M'Naghten* formulation was controversial from the beginning and has been repeatedly criticized and revised. Only a few states have preserved the *M'Naghten* defense in exactly its original form, and of the modifications, eliminating the "nature and quality of the act" language has been widely embraced.

If this Court invalidates Arizona's insanity defense statute for failing to expressly require consideration of whether a defendant knew the "nature and quality" of his criminal act, it will call into serious question the validity of the majority of state insanity statutes, which contain no such language. Currently, only 20 states explicitly mention the nature and quality concept as a portion of their insanity defense, and even these states treat that aspect of the test as subsumed within the general test of being unable to distinguish right from wrong. Moreover, contrary to Petitioner's suggestion, the states have substantively narrowed the *M'Naghten* defense in other ways, by, for instance, limiting the kinds of mental disease that may give rise to an insanity defense. At bottom, if there is any rule that may be said to be common to a large majority of the states it is precisely the Arizona rule—that legal insanity means an inability to tell right from wrong.

2. Petitioner argues, in the alternative, that even if states are constitutionally permitted to limit their insanity defense to those who did not know that their criminal act was wrong, due process requires states to provide an additional defense to those with a mental illness not rising to the level of insanity, on the theory that such disorder deprived the defendant of the capacity to form the requisite *mens rea*. Like his other argument, Petitioner's constitutional diminished capacity defense would effectively impose a substantive insanity defense on the states. But the features of a diminished capacity defense suggest that as a constitutional doctrine it would do far more to impair the states' ability to define their own substantive mental illness defenses than if this Court simply wrote *M'Naghten* into the Due Process Clause.

Petitioner's rule would overturn what the Arizona courts regarded as a legislative decision defining the substantive content of the state's criminal law. That the legislature would reject the idea that each offense should be defined to require affirmative proof that the defendant was actually capable of forming the mental states of an undiseased mind is reasonable, especially where the legislature provided a unified defense of mental disease or defect that applies equally to all crimes. This structure is consistent with the legal traditions of the nation, which rest on the common law view that proof of sanity was not an element of a crime, and required affirmative proof of insanity to excuse criminal conduct.

Adopting as a constitutional mandate the diminished capacity defense would require answers to questions that states have generally answered through their substantive insanity laws, such what is a mental illness, and when exactly can a mental illness be said to negate criminal culpability. The diminished capacity defense, which envisions a different mental illness defense for each offense, has in practice been unsuccessful in providing clear answers to these questions. If states are not free to impose clear limits, a constitutional

diminished capacity defense will either license criminal defendants to present evidence of novel and dubious theories of mental illness, or require this Court to decide as a matter of federal constitutional law what a mental illness is and how it operates to negate *mens rea*.

While a diminished capacity defense requires the constitution to answer the same difficult substantive questions of criminal law that a constitutional substantive insanity defense would, it has a crucial practical difference. Treating the question as one of negating *mens rea* effectively puts the burden on the states to prove sanity, and permits defendants to proceed under any one of several substantive insanity tests that have been rejected by the states. Under these circumstances, the state substantive insanity defenses will become superfluous. Moreover, accepting Petitioner's position that certain kinds of evidence must always negate *mens rea* implies that the Due Process Clause defines the contours of the other criminal law defenses that arguably negate the guilty mind, including duress, self-defense, mistake, and intoxication.

This Court should reject Petitioner's invitation to dictate a substantive mental illness defense to the states, and it should reject his alternative suggestion to create a constitutional diminished capacity defense, which would be equally destructive of the states' ability to define their own substantive mental illness defenses. For these reasons, amici states ask that the judgment of the court of appeals be affirmed.

## ARGUMENT

### I. The Precise Formulation of the Insanity Defense Announced to the House of Lords in Response to *M'Naghten's Case* is not a Fundamental Principle of American Law.

This Court has repeatedly affirmed the primacy of the states in enforcing their own criminal law: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977) (internal citation omitted). This deference to the states is particularly compelling in regulating the substantive content of the criminal law: "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v Texas*, 392 U.S. 514, 536 (1968) (Marshall, J., plurality opinion).

Even as zealous an advocate of applying the procedural guarantees of the Bill of Rights to the states as Justice Black recognized that constitutionalizing the substantive criminal law strikes at the very heart of our federal system: "It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs." *Id.* at 547 (Black, J., concurring). Creating constitutional rules of substantive criminal law "departs from the ancient faith based on the premise that experience in making local laws by local people themselves is

by far the safest guide for a nation like ours to follow." *Id.* (Black, J., concurring).

If there is any area of the substantive criminal law where respecting the diversity of practice among the states is especially justified, it is in defining the contours of the insanity defense: "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536 (Marshall, J., plurality opinion). In this area, perhaps as in no other, experimentation and revision in the states has been the rule. It is as true today as it was in 1968 that "formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Id.* at 536-37 (Marshall, J., plurality opinion).

### A. The *M'Naghten* Formulation was Never Recognized by the States as the Exclusive Test for Insanity.

It would be strange indeed if this Court's first departure from its well-founded reluctance to dictate substantive constitutional criminal law was to write indelibly into the criminal law of the states an advisory opinion rendered to the House of Lords more than 60 years after independence. Petitioner's complaint is not that Ariz. Rev. Stat. § 13-502 fails to contain an insanity defense based upon the general idea of the *M'Naghten* test—a concept that authoritative commentators, not least this Court, have described as the "right-wrong test." Such a claim would obviously fail, since § 13-502 focuses exclusively on knowledge of wrongfulness. Instead, Petitioner's claim is necessarily that Arizona (and by extension the other states) are compelled by the Due Process Clause to formulate their insanity defenses in very nearly identical terms to those used by Lord Chief Justice Tindal in *M'Naghten*: "to establish a defence on the ground of insanity, it must be clearly

proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, he did not know he was doing what was wrong." 8 Eng. Rep. 718, 722 (1843).

Far from being an ancient precept of the common law, the *M'Naghten* formulation is itself evidence that no consensus existed, even in the mid-nineteenth century, about the essential features of the insanity defense. The reason the Lords required the *M'Naghten* opinion was the perception that the law of insanity was confused, and they sought to impose "more uniformity in language" on judges charging juries in insanity cases, so that "[t]hey would no longer indulge in that variety of phrase which only served to perplex others, if it did not also tend to bewilder themselves . . . ; but they would use one constant phrase, which the public and all persons concerned would be able to understand." Faye Boland, *Anglo-American Defense Reform* 1 (1999) (quoting Lord Brougham). That the judges should be called upon to exercise what was essentially a legislative function, rather than a judicial one, was itself controversial. Justice Maule protested that because the Lords' questions were entirely hypothetical, they were beyond the competence of the judges who decided actual cases arising out of particular facts, and he suggested that "the answers given to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials." 8 Eng. Rep. at 720.[1]

*M'Naghten*'s reception on this side of the Atlantic belies any suggestion that American jurists saw it as the sole

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[1]Indeed, the Judges were exceptionally careful to preface the *M'Naghten* opinion with a warning against placing too much reliance on it as a comprehensive exposition of the law of the insanity defense, emphasizing that it was "impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by [the Judges] to your Lordships' questions." *Id* at 722.

authoritative formulation of the insanity defense. In the first major American case to cite *M'Naghten*, Chief Justice Shaw ignored what was later said to be the central teaching of *M'Naghten* that insanity could only be an excuse if it prevented a defendant from distinguishing right and wrong, and instead instructed that jury to acquit the defendant if it found that he committed homicide while acting "from an irresistible and uncontrollable impulse." *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 502 (1844). The leading case formulating this irresistible impulse test makes explicit that it rests on a rejection of the centrality of *M'Naghten*, which it describes as standing for the principles "[t]hat there is but a single test of the existence of that degree of insanity such as confers irresponsibility for crime," and "that there does not exist in any case of such insanity in which that single test—the capacity to distinguish right from wrong— does not appear . . . ." *Parsons v. State*, 2 So. 854, 859 (Ala. 1887). This rejection of *M'Naghten* was premised on the view that it was, even then, based upon antiquated science, and that courts should not blindly cling to stale legal abstractions in the face of rapidly evolving understandings of human psychology. *Id.* at 858.

The Supreme Court of New Hampshire took this skepticism that any legal formula could adequately capture the essence of insanity even further and essentially left the question entirely up to the jury, asking them merely whether the crime "was the product of a mental disease." *State v. Jones*, 50 N.H. 369, 398-99 (1871) (citing *State v. Pike*, 49 N.H. 399 (1869)).[2] In that court's view, if "clear, categorical, and consistent answers were possible" to the question of what the law of insanity was, then the *M'Naghten* judges would certainly have

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[2]This is also known as the *Durham* test, after *Durham v United States*, 214 F 2d 862 (D C Cir 1954), which adopted the test 80 years later After an extended, controversial period of attempting to refine the *Durham* test, the court abandoned the product rule in favor of the ALI test. *United States v Brawner*, 471 F 2d 969, 975-79 (D C Cir 1972) (en banc).

discovered them. *Id.* at 385. Because the judges "failed utterly to do any such thing," the court concluded that it was effectively impossible to announce a practical, universal legal test of insanity. *Id.* at 385, 393-94.

Even in the majority of states that eventually adopted the form of the *M'Naghten* rule, there was very little agreement about what the test actually meant. By the first part of the twentieth century, the leading commentator on the insanity defense stated categorically that "conflict of opinion exists . . . regarding almost every word of the famous Opinion of the Judges and its numerous and motley progeny." S. Sheldon Glueck, *Mental Disorder and the Criminal Law* 226 (1925).

By mid-century, continuing dissatisfaction with the *M'Naghten* and irresistible impulse tests led to a reform movement that culminated in the 1962 adoption by the American Law Institute of a defense that included both a cognitive test like *M'Naghten* and a volitional component like the irresistible impulse test, but changed their wording to focus on whether defendant had the "substantial capacity" to tell right from wrong or to control himself.[3] Under the ALI test, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01(1). This formulation was adopted by a substantial minority of the states. It was also influential in causing states to codify their mental illness defenses, and a large majority of the states eventually defined these defenses by statute, rather than caselaw. *See* Model Penal Code § 4.01, cmt. 5 (1980). Most recently, several states have repealed their complete mental illness

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[3]*See* Model Penal Code § 4.01, cmt. 2 (1980) (detailing the perceived inadequacies of the *M'Naghten* and irresistible impulse formulations of the insanity defense)

defense by statute, and instead provide that mental illness evidence be used to negate the mental state element of the crime.[4]

In summary, the history of the development of the criminal law of insanity in the states has in many ways been a history of responding to perceived inadequacies in the *M'Naghten* test and, more generally, to the problem of finding a categorical legal test that can distinguish the blameless and the culpable amidst rapid changes in both scientific knowledge of mental illness and the social and moral judgments associated with it. If it had been the Justices of this Court, rather than the Justices of England, that announced in 1843 that *M'Naghten* was the single, binding formulation of the insanity defense, none of this fruitful debate and development in the law would have occurred. There is no indication that either progress in the science of psychology or evolution in society's attitudes towards responsibility and mental illness have developed to the point that this is the moment to freeze insanity law into a rigid, constitutional mold, much less one that was formed a century and a half ago.

## B. Only a Small Minority of States Still Use the *M'Naghten* Formulation Announced to the House of Lords.

As this history of constant criticism and change suggests, there is a broad diversity in the substantive approaches to the insanity defense employed by the states. The vast majority of states no longer even pay lip service to the formulation announced in *M'Naghten*. Currently, fewer than ten states purport to preserve *M'Naghten* in substantially the

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[4] *See* Idaho Code § 18-207, Kan Stat. Ann § 22-3219, Mont. Code Ann. § 46-14-102, Utah Code Ann § 76-2-305.

same form it was announced in 1843,[5] and even some of these remaining pure *M'Naghten* states, in actual practice, depart from the orthodox formulation in structure or language. Thus, while Pennsylvania does retain *M'Naghten* as its sole test of "legal insanity," a defendant may also be found "guilty but mentally ill," if he meets the ALI insanity test. 18 Pa. Cons. Stat. Ann. § 314. Nor do pure *M'Naghten* states seem to insist that the particular formulation announced in *M'Naghten* be preserved. Thus, Nevada, which has adopted *M'Naghten* as a constitutional minimum standard, construes the first element of its test to turn on whether defendant can understand the "nature and capacity" as opposed to the "nature and quality" of his act. *Finger*, 27 P.3d at 85. Similarly, Nebraska explicitly follows the *M'Naghten* rule, but expresses the question as whether the defendant understood the nature, not the "nature and quality" of his act. *Smith*, 592 N.W.2d 143, 147 (Neb. 1999). In Mississippi, which also expressly follows *M'Naghten*, "the test for insanity is whether the defendant was unable to distinguish right from wrong at the time the act was committed." *Russell*, 729 So. 2d at 784.

Perhaps what is most striking is the nearly universal reluctance of state legislatures to enact *M'Naghten* unchanged. Of the more than forty states that have statutorily codified their mental illness defenses, it appears that in only three—Iowa, New Jersey and Washington—have lawmakers accepted *M'Naghten* as the proper test for insanity.

Other than the remaining *M'Naghten* states, the only group of states of any size that share substantively identical insanity defenses are the 13 states that have adopted the ALI

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[5] *See* Iowa Code Ann § 701 4, *Russell v State*, 729 So 2d 781, 784 (Miss 1997), *State v Bonney*, 405 S E 2d 145, 155 (N C 1991), *State v Smith*, 592 N W 2d 143, 147 (Neb 1999); N J. Stat Ann § 2c.4-1; *Finger v State*, 27 P.3d 66, 84-85 (Nev 2001), 18 Pa Cons Stat Ann § 314(c), (d), Wash Rev. Code Ann § 9A 12 010(1)

test by statute,[6] or by caselaw.[7] In a somewhat looser group are the roughly 14 states that provide a statutory cognitive impairment defense broadly focused on the ability to distinguish right and wrong, but without the volitional test or the substantial capacity language that are characteristic of the ALI test.[8] The specific content of these "modified *M'Naghten*" tests is highly variable, and indeed no two of them are exactly alike. They range from Texas's laconic defense for the defendant who "did not know his conduct was wrong," Tex. Penal Code Ann. § 8.01(a), to the much more detailed South Carolina standard which provides a defense where the defendant "lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." S.C. Code Ann. § 17-24-10(a).

The remaining states employ tests that are essentially *sui generis*. Several states have adopted unclassifiable mixtures of the *M'Naghten* and ALI tests. *See, e.g.*, Mo. Rev. Stat. Ann. § 562.086 (defense if defendant was "incapable of knowing and appreciating the nature, quality or wrongfulness of his conduct"); N.Y. Penal Law § 40.15 ("lacked substantial

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[6]*See* Ark. Code Ann. § 5-2-312, Conn. Gen. Stat. Ann. § 53a-13, Haw. Rev. Stat. Ann. § 704-400, Ky. Rev. Stat. Ann. § 504.020(1), Md. Code Ann., Crim. Proc. § 3-109(a), Mich. Comp. Laws Ann. § 768.21a(1), Or. Rev. Stat. § 161.295(1), Vt. Stat. Ann. tit. 13, § 4801(a)(1), Wis. Stat. Ann. § 971.15(1), Wyo. Stat. Ann. § 7-11-305(b).

[7]*Commonwealth v. McHoul*, 226 N.E.2d 556, 563 (Mass. 1967), *State v. Barrett*, 768 A.2d 929, 935 (R.I. 2001), *State v. Lockhart*, 542 S.E.2d 443, 451 (W.Va. 2000).

[8]*See* Ala. Code § 13A-3-1(a), Ariz. Rev. Stat. § 13-502, Cal. Penal Code § 25, Colo. Rev. Stat. Ann. § 16-8-101.5, Fla. Stat. Ann. § 775.027(1), Ind. Code Ann. § 35-41-3-6(a), La. Rev. Stat. Ann. § 14:14, Minn. Stat. Ann. § 611.026, Ohio Rev. Code Ann. § 2901.01(A)(14), Okla. Stat. Ann. tit. 21, § 152.4, S.C. Code Ann. § 17-24-10(a), S.D. Codified Laws § 22-1-2(20), Tenn. Code Ann. § 39-11-501(a), Tex. Penal Code Ann. § 8.01(a).

capacity to know or appreciate either . . . [t]he nature and consequences of such conduct ; or . . . [t]hat such conduct was wrong."). While three states maintain what is effectively the traditional irresistible impulse test, each defines the volitional component of the test differently.[9] Several other states provide different levels of affirmative mental illness defense depending on the specific type of insanity. *See, e.g.*, Del. Code Ann. tit. 11, § 401 (not guilty by reason of insanity if lacked substantial capacity to appreciate wrongfulness, but guilty but mentally ill if suffered from psychiatric disorder that interfered with willpower). Other states with unique mental illness defenses include New Hampshire, which continues to employ the product test, *see* N.H. Rev. Stat. Ann. § 628:2, and North Dakota, which provides a defense where the defendant "lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality," but only applies the defense where willfulness is an essential element of the charged crime. N.D. Cent. Code § 12.1-04.1-01.

Nor is it the case, as Petitioner suggests, that states have generally only departed from *M'Naghten* to broaden its scope. To the contrary, a majority of the states have provided an insanity defense narrower than *M'Naghten* would provide, at least on its face, by defining a class of mental illnesses for which no defense is available. This practice is traceable to the Model Penal Code, which provides that "the terms 'mental

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[9] *See* Ga Code Ann § 16-3-2, 16-3-3 (not guilty if delusion "overmastered will to resist committing crime"), *State v Hartley*, 565 P 2d 658, 660 (N.M 1977) (defense "if . defendant has been deprived of or lost the power of his will which would enable him to prevent himself from doing the act"), *Vann v Commonwealth*, 544 S E 2d 879, 883 (Va Ct App 2001) (irresistible impulse defense "when the accused's mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act")

disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." M.P.C. § 4.01(2). Although this caveat was frequently criticized as intruding on what should properly be a psychiatric question, *see* Wayne R. LaFave, *Substantive Criminal Law* § 7.5(b)(2) (2d ed., 2003), 11 of the 13 ALI states have adopted that portion of the Model Penal Code, and the limitation on defenses for mental illnesses evidenced by antisocial behavior has spread widely to states with modified *M'Naghten* insanity tests and other cognitive tests, and even to Utah and Montana, which have eliminated the affirmative mental illness defense. Utah Code Ann. § 76-2-305(4)(b); Mont. Code Ann. § 46-14-101(2)(b)(i). In addition to the antisocial behavior mental illness exclusion, a number of other states have permitted defenses only for severe mental illnesses, Ala. Code § 13A-3-1(b); Ind. Code Ann. § 35-41-3-6(b); Ohio Rev. Code Ann. § 2901.01(A)(14); Tenn. Code Ann. § 39-11-501(a). Several others have excluded specific conditions from eligibility for a mental illness defense, including personality disorder, Or. Rev. Stat. § 161.295(2), adjustment disorder, seizure disorder, and substance abuse, Cal. Penal Code § 25.5, compulsive gambling, Conn. Gen. Stat. Ann. § 53a-13(c), and alcoholism, Mont. Code Ann. § 46-14-101(2)(b)(iii). In all, slightly more than half the states completely remove certain kinds of mental abnormalities from consideration as excusable mental illnesses, regardless of what effect these conditions actually had on a defendant's cognition or volition. While widely accepted by the states, this kind of restriction on what could qualify as a "disease of the mind" was not included in *M'Naghten*, and is inconsistent with Petitioner's position that only a few states have ever narrowed *M'Naghten*, and that such narrowing is presumptively unconstitutional.

The time when the states accepted the *M'Naghten* formulation of the insanity defense as an especially authoritative test is long past. Indeed, the fact that the states

have manifestly failed to approach a consensus about what exactly a substantive insanity defense should include is evidence not just of the inadequacy of the *M'Naghten* test, but the difficulty of formulating any substantive test adequate to accommodate the constantly changing views of mental illness and criminal responsibility in our society. Writing any particular substantive mental illness defense into state law through the Due Process Clause would negate this diversity and frustrate the search for better ways to define the line between mental illness and criminal responsibility.

### C. A Substantial Majority of the States Have Rejected Knowledge of the Nature and Quality of an Act as an Independent Element of Their Insanity Tests.

Petitioner concedes that only 20 states expressly consider whether defendant understood the nature and quality of his act, or an equivalent concept, in ascertaining whether to accord him an insanity defense. They can be broken down as follows: In addition to the eight pure *M'Naghten* jurisdictions, the two remaining common law irresistible impulse jurisdictions also preserve the nature and quality element as a separate portion of their cognitive tests.[10] This language is much less common in states that have statutorily reformed their defenses, however. Only four states have retained "nature and quality of the act" as a distinct statutory element, and one of these has eliminated the "did not know what he was doing was wrong" portion of the test.[11] Six other statutory cognitive tests retain the idea, but in different form, either by dropping one of

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[10] *State v Hartley*, 565 P 2d 658, 660 (N M 1977), *Vann v Commonwealth*, 544 S E 2d 879, 883 (Va Ct App 2001).

[11] Ala Code § 13A-3-1(a), Alaska Stat § 12.47 010 (eliminating wrongfulness), Cal Penal Code § 25, Mich Comp. Laws Ann § 768 21a(1); N D Cent Code § 12 1-04 1-01

the terms, or by substituting more or less similar language.[12]

But by far the most common approach of statutory codifications is to abandon, as Arizona did, any reference to nature and quality of the act, in preference to a cognitive test that focuses on the ability to tell right from wrong. Most notably, the ALI test abandons any reference to understanding the nature of the conduct at issue, and focuses instead on the defendant's capacity to appreciate the wrongfulness (or criminality) of the act, an approach followed virtually without exception by the jurisdictions adopting the ALI test.[13] *See also* LaFave, *Substantive Criminal Law* § 7.2, n.7 (noting that "[s]everal states have now adopted the *M'Naghten* rule by legislation, typically without the 'nature and quality of the act' prong").

Despite the fact that the ALI test is as bereft of any mention of "nature" or "quality" as the Arizona test he condemns, Petitioner insists that the many jurisdictions employing the ALI formulation actually support his position that the nature and quality element is fundamental, because the ALI test is "broader than and subsumes the *M'Naghten* rule." Pet. Br. at 38. While Petitioner is quite right that the ALI test subsumes both prongs of the original *M'Naghten* formulation, it is for a reason that applies equally to Arizona's statute, or any other cognitive test focused on wrongfulness. Any test that requires knowledge (or capacity to appreciate) that one's acts are wrong, requires, as a logical predicate, knowledge of what

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[12]*See* Fla Stat Ann § 775 027(1) (defendant did not "know what he was doing or the consequences thereof"), Minn Stat Ann § 611 026 (nature only), Tenn Code Ann § 39-11-501(a) (nature only), N Y Penal Law § 40.15 (lacked substantial capacity to know or appreciate "nature and consequences" of such conduct), Mo Rev. Stat Ann § 562 086 (incapable of knowing and appreciating the nature, quality or wrongfulness of conduct).

[13]Michigan is the sole exception Mich Comp Laws Ann § 768 21a(1)

those acts are: "If the defendant does not know the nature and quality of his act, then quite obviously he does not know that his act is wrong." LaFave, *Substantive Criminal Law* § 7.2(b)(4). It is because of this fundamental redundancy that insanity tests that drop the express nature and quality test, like Arizona's, and like the ALI test, do not subtract anything significant from the *M'Naghten* formulation.

Petitioner has not suggested what kind of mental illness could, even in theory, leave a person with an intact ability to understand that his act was wrong, while destroying his ability to know what the nature of his act was. Instead, Petitioner sidesteps the question by changing the test. While Petitioner speculates that "unawareness of the nature of his acts could coexist in [his] psychotic mind with knowledge of the wrongness of killing," Pet. Br. at 47, that is beside the point. To be sane under the Arizona statute, a defendant must know "at the time of the criminal act" that "the criminal act" was wrong. Thus, the real question is whether unawareness of the nature of his acts could coexist in his mind with knowledge that *his acts* were wrong. If Petitioner suffered from such an idiosyncratic mental illness, he has pointed to nothing in the record that would show it.

If this Court invalidates Arizona's insanity defense statute because it does not explicitly mention the failure to recognize the nature and quality of one's acts as a separate basis for acquittal, it will call into serious question the constitutionality of the majority of state insanity defense laws, which are similarly silent on the issue. Petitioner offers no justification for such a radical departure from this Court's confirmed unwillingness to disturb state substantive criminal law under the authority of the Due Process Clause.

To be sure, none of the foregoing should be read to gainsay that *M'Naghten* was, and remains, a touchstone of American criminal law. The point is that what was important about *M'Naghten* was not the exact words the Lord Chief

Justice chose to express the idea, but rather the idea itself—that the relevance of insanity to criminal liability was the extent to which it prevented the defendant from knowing what he was doing was wrong. That excusing those (and only those) who did not know they were doing wrong is the aspect of *M'Naghten* that has influenced American law is demonstrated most clearly by the fact that *M'Naghten* is widely and authoritatively known as the "right-wrong test." Although Petitioner dismisses this usage as a mere colloquialism, Pet. Br. at p. 37 n.40, those who have thought "right-wrong test" an appropriate synonym for *M'Naghten* include many eminent commentators, generally in contexts where loose language would be unlikely. *See, e.g.*, Albert W. Alschuler, *The Changing Purposes of Criminal Punishment*, 70 U. Chi. L. Rev. 1, 13 & n.2 (2003); LaFave, *Substantive Criminal Law* § 7.1(a); *Powell v. Texas*, 392 U.S. 514, 536 (1968) (Marshall, J., plurality opinion); *Durham v. United States*, 214 F.2d 862, 869 (D.C. Cir. 1954) (Bazelon, J.). In contrast, if any American authority has ever referred to *M'Naghten* as "the nature-quality test," even colloquially, Petitioner has not brought it to the Court's attention.

In addition to being widespread in American law, the idea that a test based on distinguishing right from wrong is the quintessential feature of *M'Naghten* is as old as American awareness of the case itself. *See Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501-02 (1844) (describing *M'Naghten* as standing for the rule of law that a "man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong"); *see also Parsons v. State*, 2 So. 854, 859 (Ala. 1887) (describing the "single test" of *M'Naghten* as "the capacity to distinguish right from wrong").

To the extent that *M'Naghten* continues to animate American insanity law, it is not through the respect states have for its form; as amici have shown, that form has been

abandoned, in whole or in part, by a large majority. Rather, the continuing influence of *M'Naghten* is shown by the fact that fully 44 states have insanity defenses that explicitly determine culpability (at least in part) with reference to the defendant's understanding that what he was doing was wrong. This, of course, is precisely what Ariz. Rev. Stat. § 13-502 provides. Arizona's substantive insanity defense reflects not only the broad American consensus about what *M'Naghten* stands for, but also embodies the one element of the diverse substantive insanity tests that can accurately be said to be common to a large majority of the states.

## II. No Fundamental Principle of Justice Requires States to Provide a Diminished Capacity Defense.

The trial court, after considering all the evidence Petitioner presented regarding his mental condition, found as a factual matter that he was not insane within the meaning of Arizona law. That is, at the time of his criminal act he was not "afflicted with a mental disease or defect of such severity that the [he] did not know the criminal act was wrong." Ariz. Rev. Stat. § 13-502(A). While he does not challenge that determination here, Petitioner argues that the trial court erred in failing to consider whether the same evidence established that he was incapable of knowing that his act would cause the death of a police officer. But under Arizona law, and under the facts of this case, it is really the same question. If Petitioner had a mental disease that rendered him incapable of knowing that his act would cause the death of a police officer, then that condition would equally have made him unable to know that the same act was wrong. Requiring affirmative proof that Petitioner was capable of entertaining the basic mental states by which the culpability of criminal conduct is judged in Arizona effectively requires the prosecution to prove that Petitioner was sane. While many states have taken this approach, either by requiring

the prosecution to disprove insanity generally, or by requiring the prosecution to establish that the defendant was capable notwithstanding any mental illness, of entertaining the specific intent required for a crime, the Due Process Clause requires no such result. To the contrary, the common law tradition is that proof of sanity is not an element of the prosecution's case on *mens rea*, but is a defense that must be affirmatively raised and proved by the defendant. To hold that due process compels such a diminished capacity defense would seriously undermine the states' ability to define their own substantive criminal law, and would threaten to replace it with a federal constitutional law of insanity of uncertain scope and content.

### A. The *Mott* Rule is a Substantive Rejection of the Diminished Capacity Defense, and Excludes Evidence Because it is Irrelevant Under the State's Substantive Law.

In an attempt to analogize his case to such cases as *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Chambers v. Mississippi*, 410 U.S. 284 (1973), Petitioner suggests that the trial court's refusal to consider mental illness evidence offered to establish that he was incapable of forming the requisite *mens rea* amounted to a "blanket exclusion" of exculpatory evidence. But it is a strange kind of blanket exclusion which, at least in this case, actually excluded no evidence. Petitioner's true complaint is that the *Mott* rule prohibited the trial court from considering evidence of mental disease for certain purposes—specifically, deciding whether Petitioner possessed the requisite *mens rea*. That *Mott* has this effect shows that it is more than just an evidentiary rule, like those at issue in *Rock* and *Chambers*. Rather, as *Mott* makes clear, it is a recognition that the Arizona legislature has substantively defined *mens rea* in such a way as to make mental disease evidence irrelevant.

*Mott* is quite explicit in explaining that its result rests on the fact that the Arizona legislature did not establish a diminished capacity defense (and indeed implicitly rejected such a defense), and that "the legislature is responsible for promulgating the criminal law." *State v. Mott*, 931 P.2d 1046, 1050-51 (Ariz. 1997). Thus, "[b]ecause the legislature has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent." *Id.* at 1051. Any evidentiary exclusion *Mott* effects is because the evidence relates to a substantive defense that does not exist. It is simply an application of the uncontroversial rule that irrelevant evidence should be excluded.

Nor, contrary to Petitioner's suggestion, does this reading ascribe to the Arizona legislature an irrational desire to treat those incapable of forming *mens rea* identically to those with no mental illness. Rather, it suggests the quite reasonable decision to use a single standard to judge the behavior of all defendants who purport to suffer from such a severe mental disease that they are incapable of forming the mental states that are used to gauge the criminal culpability of those without a mental illness. This single standard is embodied in Arizona's affirmative insanity defense, and is the method by which evidence of mental illness can be used to negate *mens rea*.

## B. A Constitutional Diminished Capacity Defense is Contrary to the Common Law Tradition That Proving Sanity is an Not an Element of the Prosecution's Case.

It is hardly surprising that Arizona's lawmakers have chosen a single, unified mental illness defense, rather than requiring proof that the defendant lacks a mental illness preventing formation of a particular culpable mental state as an element of each crime. Arizona's method of assessing the

impact of mental disease on culpability is supported by several hundred years of common law tradition. At common law, the rule was clear. The prosecution was not affirmatively required to prove that the defendant had the capability to form intent. Instead, sanity was presumed, and the burden was on the defendant to show that his cognition departed so far from normal that he should be excused from criminal liability. *M'Naghten* makes this point explicitly: "the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction."[14] 8 Eng. Rep. 718, 722 (1843).

Although he is elsewhere quite insistent that *M'Naghten* be strictly observed, on this lone point Petitioner criticizes the case as the culmination of a "preoccup[ation] with developing . . . arbitrary tests of irresponsibility" which distracted courts from a more ancient tradition of using mental health evidence to cast doubt on the *mens rea* elements of certain offenses. Pet. Br. at 29-30 & n.37. In reality, diminished capacity is a modern development, and is in fact yet another attempt by courts to accommodate perceived limitations in *M'Naghten*'s insanity test to evolving psychological science. *See, e.g., State v. Wilcox*, 436 N.E.2d 523, 524-30 (Ohio 1982) (tracing development of diminished capacity doctrine from its origins in an 1867 Scottish case, and noting that "[t]he diminished capacity defense does serve to ameliorate the limitations of the traditional, *M'Naghten*, right from wrong test for insanity.").

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[14]Blackstone also makes clear that the common law saw insanity as a special excuse, rather than as a part of the definition of a crime. After considering the crimes and punishments available at common law, the Commentaries separately consider the "several pleas or excuses," including insanity, which are "particular and special exceptions" to the "general rule that no person shall be excused from punishment for desobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves." 4 William Blackstone, Commentaries * 21

Moreover, the reticulated mental states that diminished capacity envisions have much more to do with modern psychology than with any traditional notions of legal responsibility:

> The law recognizes no degree of sanity. Applying socially and morally acceptable standards a line has been drawn—on one side are the legally sane, on the other side are the legally insane. "[T]o the psychiatrist mental cases are a series of imperceptible gradations . . . , whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane."

*State v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982) (quoting *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945)). While states may reasonably depart from the common law tradition by making the fact that a defendant had a sufficient level of rationality to form a particular mental state an element of every crime, the Due Process Clause does not prohibit states from following the common law tradition of making insanity a separate question from the particular *mens rea* necessary for the crime.

### C. A Constitutional Diminished Capacity Defense Would Displace State Substantive Insanity Defenses With an Ill-Defined Constitutional Law of Insanity.

As with nearly every aspect of insanity law, many jurisdictions have freely departed from the common law tradition, either by putting the burden to disprove a global

affirmative defense of insanity on the prosecution, or by providing a diminished capacity defense requiring proof of the ability to form the specific mental state at issue. The experience of these jurisdictions demonstrates, however, that diminished capacity is a diffuse, fluid concept that would be extraordinarily problematic as a constitutional doctrine. While Petitioner's argument that *M'Naghten* is incorporated in the Due Process Clause deeply impinges on the states' prerogative to determine their own substantive criminal law, it would at least impose on the states a specific, concrete test with a long history of interpretation and analysis defining its parameters. In contrast, diminished capacity has no such structure and would either permit criminal defendants an unlimited right to present psychological evidence of dubious reliability and relevance, or alternatively, require this Court to develop limiting principles of constitutional insanity law. This unpalatable choice shows that the proper path is the one the Court has always followed—permitting states to decide the content of their own substantive criminal law.

1. Under Petitioner's proposed constitutional diminished capacity doctrine, states would be required to consider mental illness, short of insanity as defined by state law, whenever it might, factually, negate the capacity to form the *mens rea* associated with the charged offense. But this rule actually raises more questions than it answers. First, what is a mental illness, for constitutional purposes? Generally, states have refrained from offering specific definitions of what a mental disease or defect is, instead relying on the insanity tests themselves to narrow the class of conditions to which the defense was applicable, or have defined the concept by specifying what a mental illness is not. But Petitioner's proposed rule contains no such limiting principle, opening the door to one of the problems that has frequently accompanied the insanity defense: speculative and unreliable theories of mental disease. *See, e.g., Zamora v. State*, 361 So.2d 776, 779

(Fla. Ct. App. 1978) (rejecting defense founded on expert testimony of "acute subliminal television intoxication"); *Chase v. United States*, 468 F.2d 141, 148 (7th Cir. 1972) (rejecting claims that defendants were entitled to show with expert testimony that they lacked cognitive capacity to distinguish right from wrong because their moral judgment about war was at odds with that of society); *see also* LaFave, *Substantive Criminal Law* § 7.2(b)(1), nn. 52-53 (describing novel theories of mental illness, ranging from "homosexual panic" defense, to "urban survival syndrome," to "cultural paranoia").[15] Even where speculative theories of mental illness are rejected by juries, permitting their presentation has costs, since such theories frequently generate substantial adverse publicity that tends to call into question in the minds of the public whether the criminal justice system actually seeks justice. Moreover, requiring state criminal law to treat such conditions with the same gravity as it accords what states have determined to be serious mental illnesses tends to denigrate the import of the insanity defense in the minds of potential jurors and may even cause the public to question whether mental illness is actually a serious disease.

It is no solution to rely on scientific definitions of mental illness. As the Court of Appeals for the District of Columbia Circuit said in a landmark case:

> Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a 'mental disease or defect' for

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[15]Indeed, it was precisely this kind of problem that led to the repudiation of the diminished capacity defense in California, particularly after the outcry that followed the use of the so-called "twinkie defense." *See People v. White*, 117 Cal. App. 3d 270 (1981), *State v. Wilcox*, 436 N.E.2d 523, 531 (Ohio 1982)

> clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility.

*McDonald v United States*, 312 F.2d 847, 851 (D.C. Cir. 1962) (en banc). The alternative to *ad hoc* definitions of mental illness is for this Court to define a constitutional standard for what a mental disease is. But there is no constitutional source that suggests an answer to this question, or even how one might approach, to take one instance, the question of whether a particular cultural background might give rise to a mental illness defense. *See, e g*, Note, *The Cultural Defense in Criminal Law*, 99 Harv. L. Rev. 1293, 1293-95 (1986) (explaining how differing cultural values might give rise to an insanity or diminished capacity defense). Defining what a "mental illness" is for criminal law purposes is neither a trivial problem nor one that a constitutional diminished capacity defense could avoid, at least without imposing high costs on the perceived reliability, indeed even the seriousness, of the criminal justice system.

The second question Petitioner's argument raises is what, exactly, does it mean for a particular mental illness to negate *mens rea*? If Arizona is not permitted to decide, as it did here, that only conditions that satisfy its particular substantive insanity defense negate *mens rea*, then it will effectively lose the ability to define what insanity means in Arizona. A constitutional diminished capacity test would license criminal defendants to argue any one of the many varieties of mental-illness defense, even though the state may have rejected them by substantive law. For example, even if a state has rejected a volitional test of insanity, a defendant will nevertheless be able to argue that the existence of a mental condition affecting his self-control raises reasonable doubt about whether he acted intentionally or purposely with respect to the particular conduct

at issue. In short, a constitutional diminished capacity defense very quickly will become a version of the product test, with juries invited to determine in each case, with very little guidance, what the effect of a defendant's claimed mental illness should be on his culpability. *See* Peter Aranella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 827, 845 (1977) ("Since the diminished capacity defense requires the jury to make an individualized culpability judgment in each case, it does not lend itself to a consistent and principled application.").

Moreover, Petitioner's position would require that courts effectively rewrite every state's substantive law of *mens rea*. As a majority of this Court recognized in *Montana v. Egelhoff*, states have broad discretion to define the elements of crimes, and to define a crime's *mens rea* element in such a fashion as to make certain excuses factually and legally irrelevant. 518 U.S. 37, 41 n.4 (plurality opinion); *id.* at 58 (Ginsburg, J., concurring) (states may define *mens rea* to exclude entirely question of voluntary intoxication); *see also Martin v. Ohio*, 480 U.S. 228, 235 (1987) (Ohio free to define mental state element of aggravated murder so that it is not defeated by purportedly lawful or non-criminal intent such as that involved in self-defense); *Patterson v. New York*, 432 U.S. 197, 206 (1977) (New York free to define mental state element of murder so that proving lack of extreme emotional disturbance not element of state's case). Petitioner, by contrast, seeks to force on the states a uniform constitutional *mens rea* rule under which the effects of mental illness are always relevant. Such a rule is inconsistent with the states' acknowledged primacy in defining their own substantive criminal law.

2. A constitutional diminished capacity test would threaten to supercede the substantive insanity defenses now set forth in state law. Defendants may certainly prefer to argue

diminished capacity in most, if not all, cases, since it provides three important advantages over the affirmative insanity defenses. First, a diminished capacity defense results in a complete acquittal for the defendant, rather than automatic detention and commitment that acquittals based upon insanity generally produce. This would undermine the states' important interest in making sure that persons with mental illnesses that have rendered them dangerous to others are prevented from harming others and required to receive treatment. Second, the diminished capacity defense, because it is conceived of as an element of the state's case, requires the prosecution to disprove the effect of the mental illness on culpability beyond a reasonable doubt. In contrast, many states follow the common law tradition and place the burden of proof of insanity on the defendant. The third important reason defendants are likely to prefer constitutional diminished capacity to an affirmative insanity defense is the strategic flexibility that the definitional and doctrinal uncertainty discussed above provides. If the mental condition for which a defendant seeks a defense is not recognized as a mental disease under state law, or if the standard of impairment is difficult to meet, the defendant will be able to reformulate the defense as one going to the capacity to form *mens rea*.

Ultimately, adopting the diminished capacity defense as a principle of constitutional law would have implications for primacy of state substantive criminal law far beyond the specific context of insanity. Petitioner's argument rests, at bottom, on the idea that the Due Process Clause regulates the relationship between *mens rea* and criminal culpability. If this is really the case, then this Court will need to develop a constitutional doctrine of *mens rea* that explains not just what the minimal level "guilty mind" is required for conviction, but indeed, what factors are necessarily sufficient as a constitutional matter to negate *mens rea*. This implies that the Court will need to develop constitutional doctrines for other defenses that

have traditionally excused otherwise guilty conduct, including things like mistake, duress, self-defense and intoxication. In short, creating a constitutional diminished capacity defense is a first step down a long, uncertain path that ultimately leads to a comprehensive substantive criminal law of the Due Process Clause. This Court has consistently refrained from embarking on such a course, a determination this case presents no occasion to relax.

## CONCLUSION

For these reasons, amici states urge that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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March 2006

(4)

No. 05-5966

IN THE

# Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner*,

v.

STATE OF ARIZONA,

*Respondent.*

**On Writ of Certiorari to the Arizona Court of Appeals**

## BRIEF OF THE TREATMENT ADVOCACY CENTER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY


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JANUARY 30, 2006

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## BRIEF OF THE TREATMENT ADVOCACY CENTER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Treatment Advocacy Center ("TAC") is a non-profit organization dedicated to eliminating barriers to treatment for individuals with severe mental illnesses, thereby reducing the consequences of non-treatment such as homelessness, arrest, victimization, hospitalization and violence.[2] TAC's mission is largely focused on improving state civil commitment laws, policies and practices. As a result of outdated civil commitment laws, severely mentally ill people too often are left untreated, which studies have shown leads them to commit acts of violence and become criminal defendants. Proper treatment reduces the likelihood of a severely mentally ill person committing an act of violence to that of an individual without such a disorder. TAC therefore advocates for interventions that can provide early and sustained treatment before a person suffering from severe mental illness becomes dangerous or commits an act of violence.

As the Court considers the questions presented for review, TAC submits that the Court should take into ac-

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[1] Letters from the parties consenting to the filing of *amici* briefs have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief, in whole or in part, and that no entity or person, aside from *amicus* and its counsel, made any monetary contribution to the preparation or submission of this brief.

[2] In the interest of maintaining its objectivity, the Treatment Advocacy Center does not accept contributions from pharmaceutical companies or affiliated trade organizations.

count the body of recent research into a neurological deficit known as anosognosia. Anosognosia, which is a common symptom of severe mental illness, inhibits a person's ability to perceive that he is ill and needs to obtain treatment, thus increasing the likelihood that he will engage in criminal behavior. Anosognosia thereby directly impacts whether a mentally ill defendant is morally culpable for his actions. TAC urges that the legal and moral issues presented where a criminal defendant is suffering from anosognosia be fully considered by this Court as it decides the questions before it.

## SUMMARY OF ARGUMENT

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250–51 (1952) (citation omitted). Put another way, "there could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of his act[.]" *Sinclair v. State*, 132 So. 581, 585 (Miss. 1931) (concurring opinion).[3]

As this Court and many other courts have recognized, it has been well established over the course of Anglo legal history that criminal defendants whose mental incapacity prevented them from appreciating the nature of their behavior should be treated differently by the legal system than defendants who did not suffer from a mental deficit. As such, our system of laws has provided, for centuries, a

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[3] The majority in *Sinclair* held that a statute abolishing the insanity defense in homicide cases violated the due process clause of the Mississippi Constitution.

defense to crime in the form of a plea of insanity. This defense seeks to prevent the unjust punishment, and to encourage the necessary treatment, of people who lack the ability to understand their own actions, while at the same time ensuring the safety of society from violent acts committed by the untreated mentally ill.

Research consistently has shown that severely mentally ill persons who receive proper treatment are no more violent than the general public. It therefore greatly serves the interests of both those afflicted and the general public to treat the severely mentally ill before they commit acts of violence. However, before a person can seek treatment for mental illness, that person must be aware of and accept his condition. Research now has shown that a neurological deficit known as anosognosia prevents many of those with the most serious psychiatric conditions from recognizing, and thus treating, their own illnesses. Compounding this problem, state civil commitment laws often hinder the ability of states to override refusal of treatment until that person poses a danger to himself or others.

TAC is concerned that the insanity defense is becoming a scapegoat for problems actually created by unworkable state civil commitment laws. In the growing number of states that have adopted less restrictive commitment standards, earlier treatment has been shown to reduce arrests and the risk of harmful behavior. In states that have not lowered this barrier to treatment, the insanity defense is often a mentally ill defendant's (and society's) last significant, and sometimes only, opportunity to obtain treatment.

In furtherance of its mission to obtain timely treatment for the severely mentally ill, TAC submits that recent medical research concerning anosognosia should be considered by the Court in weighing whether any specific formulation of the insanity defense comports with the Due Proc-

ess Clause of the Fourteenth Amendment to the United States Constitution.[4] This research, which demonstrates that victims of severe mental illness often are unable to recognize their own disease, provides scientific support for the deeply-rooted common law view that the insane are not morally responsible for their antisocial behavior. As the Court weighs whether Arizona's formulation of the insanity defense and its evidentiary exclusion comport with due process, TAC urges the Court to consider that many of the people to whom these rules apply are rendered incapable, by a symptom of their illness, of understanding that they are ill and need treatment.

TAC does not advocate a particular formulation of the insanity defense, nor does it take a position on whether Arizona's laws comport with the Constitution. TAC does advocate that constitutional due process requires that the goals of the insanity defense—to obtain treatment for the severely mentally ill while protecting society—be advanced by the availability in all states of a meaningful insanity defense based upon a defendant's mental incapacity.

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[4] This Court has frequently relied on scientific and sociological data in examining fundamental Constitutional rights. *See e.g., Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (looking to the "effect of segregation itself on public education"); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (examining "clinical definitions" of mental retardation to determine if the "deficiencies" of the mentally retarded "diminish their personal culpability"); *Roper v. Simmons*, __ U.S. __, 125 S.Ct. 1183, 1195 (2005) (citing "scientific and sociological studies" to support the proposition that "juvenile offenders cannot with reliability be classified among the worst offenders" due to their lack of maturity).

## ARGUMENT

### I. IT HAS BEEN RECOGNIZED FOR CENTURIES THAT CRIMINAL DEFENDANTS WHO LACK UNDERSTANDING OF THEIR ACTIONS, AND THEREFORE LACK MORAL CULPABILITY, SHOULD BE TREATED DIFFERENTLY BY THE LEGAL SYSTEM THAN OTHER DEFENDANTS.

This Court has recognized the "belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). State rules and laws regarding burdens of proof and production in the criminal context are "subject to proscription under the Due Process Clause" only when they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201–202 (1977) (citation omitted). Insanity is "a deficiency in will, which excuses the guilt of crimes." William Blackstone, 4 *Commentaries* *25. Few criminal defenses are as firmly rooted in our traditions as the insanity defense.

The English common law has recognized insanity as a bar to criminal culpability for over seven hundred years. *See* Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 Geo. L.J. 1371, 1434 (1986). In the thirteenth century, Bracton wrote that "a crime is not committed unless the intention to injure exists, as may be said of a child or a madman." 2 Henry de Bracton, *On the Laws and Customs of England* 384 (S. Thorne trans. 1968). Madmen commit no crimes, he wrote, "since they are without sense and reason . . . ." *Id.* at 424. Throughout the history of the

English common law, the same rule is repeated time and again.[5] Hence, when the House of Lords announced the *M'Naghten* rule in 1843, it merely fine-tuned a centuries-old doctrine. *See M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

The American common law recognized insanity as a bar to criminal culpability both before and following *M'Naghten*. *See United States v. Clarke*, 25 F. Cas. 454 (C.C.D.D.C. 1818) (court instructed jury that if defendant was "in such a state of mental insanity, not produced by the immediate effect of intoxicating drink, as not to have been conscious of the moral turpitude of the act, they should find him not guilty"); *United States v. Drew*, 25 F. Cas. 913 (C.C.D. Mass. 1828) (finding defendant not guilty by reason of insanity); *Commonwealth v. Rogers*, 48 Mass. 500, 503 (1844) (holding that defendant should be acquitted if his

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[5] *See* William Lambarde, *Eirenarcha* Cap. 21.218 (London, R. Tottell and C. Barker, 1581) ("If a mad man or a naturall foole, or a lunatike in the time of his lunacie . . . do kil a ma[n], this is no felonious acte, nor anything forfeited by it . . . for they ca[n]not be said to haue any understanding wil."); Edward Coke, *Institutes of the Laws of England* 247b (London, John More, 1629) ("in Criminall Causes, as Felonie, &c. the act and wrong of a mad man shall not be imputed to him, for that in those causes, *Actus not facit reum, nisi mens sit rea*, and he is *Amens (id est) sine mente*, without his minde or discretion; and *Furiosus solo furore punitur*, a mad man is only punished by his madnesse"); Michael Dalton, *The Countrey Justice* 283 (London, R. Atkyns and E. Atkyns, 1666) ("If one that is *Non compos mentis*, or an ideot, kill a man, this is no Felony; for they have not knowledg of good and evil, nor can have a Felonious intent, nor a will or mind to do harm . . . . So it is, if a Lunatick person killeth another during his lunacy, it is no Felony . . . ."); William Blackstone, 4 *Commentaries* *25 ("idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities"); 1 William Hawkins, *A Treatise of the Pleas of the Crown* 1 (London, J. Walthoe, 1716) ("The Guilt of offending against any Law whatsoever, necessarily supposing a wilful Disobedience thereof, can never justly be imputed to those who are either uncapable of understanding it, or of conforming themselves to it[.]").

crime "was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will"); *People v. Lake*, 12 N.Y. 358 (1855) (discussing expert testimony regarding insanity and citing *M'Naghten*); *United States v. Holmes*, 26 F. Cas. 349, 357–58 (C.C.D. Me. 1858) (citing *M'Naghten* and *Rogers*, and holding that jury charges on insanity were correct); *State v. McCoy*, 34 Mo. 531, 533, 536 (1864) (endorsing the *Rogers* rule). By the time that the Fourteenth Amendment was passed in 1866, the insanity defense had firmly taken root in American law.

Underlying these hundreds of years of jurisprudence is an unwavering belief that the insane act without an understanding and appreciation of the consequences of their behavior. This lack of awareness requires, from a constitutional standpoint, that some provision be made for the severely mentally ill to be treated differently under the criminal law.

## II. RECENT SCIENTIFIC FINDINGS ABOUT THE NATURE AND EFFECT OF SEVERE MENTAL ILLNESSES ARE ESSENTIAL IN THE DUE PROCESS CONSIDERATION OF ANY CRIMINAL DEFENSE BASED ON A PERSON'S ABILITY TO COMPREHEND THE NATURE, QUALITY OR WRONGFULNESS OF HIS CONDUCT.

Society today knows more than ever about severe mental illnesses and the unique challenges they present to those afflicted. For example, it is now established that severe mental illnesses, such as schizophrenia, are medical diseases that impair the very organ that is used to make deci-

sions.[6] It is now also known that among the symptoms of these diseases is the neurological deficit anosognosia, which prevents affected individuals from knowing they are ill and thus from obtaining treatment.[7] Anosognosia is a biologically-based inability to appreciate one's own illness. Thus, it differs from denial, which is a psychologically-based coping mechanism common within the non-mentally ill population.[8] Despite the public perception that people with severe mental illnesses are more violent than the general public,[9] empirical evidence only supports this view as to people with untreated severe mental illnesses.[10] Research strongly suggests that

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[6] *See generally* U.S. Department of Health & Human Services, Substance Abuse and Mental Health Services Administration, Center for Mental Health Services, National Institutes of Health, National Institute of Mental Health, *Mental Health: A Report of the Surgeon General* (1999).

[7] Treatment Advocacy Center, *Impaired Awareness of Illness (Anosognosia): A Major Problem for Individuals with Schizophrenia and Bipolar Disorder*, http://www.psychlaws.org/BriefingPapers/BP14.htm (last visited January 26, 2006).

[8] Xavier Amador & Henry Kronengold, *Understanding and Assessing Insight*, in *Insight and Psychosis: Awareness of Illness in Schizophrenia and Related Disorders* 3, 25 (Xavier Amador and Anthony David, eds. 2004).

[9] Patrick W. Corrigan et al., *Implications of Educating the Public on Mental Illness, Violence, and Stigma*, 55 Psychiatric Services 557 (2004).

[10] An English study of 1,015 forensic patients with severe mental illness ("functional psychosis") reported that the diagnosis of "schizophrenia was most strongly associated with personal violence" and that "more than 75 percent of those with a psychosis were recorded as being driven to offend by their delusions." The authors concluded that "treatment appears as important for public safety as for personal health." Pamela J. Taylor et al., *Mental Disorder and Violence*, 172 Brit. J. Psychiatry 218, 218 (1998). *See also* Stephen J. Bartels et al., *Characteristic Hostility in Schizophrenic Outpatients*, 17 Schizophrenia Bull. 163, 166 (1991); Jeffrey Swanson et al., *Violence and Severe Mental Disorder in Clinical and Community Populations: The Effects of Psychotic Symptoms, Co-*

people with severe mental illnesses who are being treated are no more violent than the general public.[11] Because anosognosia hinders treatment, it increases the odds that those afflicted will commit acts of violence and become criminal defendants.[12]

Anosognosia can prevent a mentally ill person from comprehending—and thereby treating—his own illness. Lack of treatment is known to increase the risk of this person committing a violent act. Consequently, the moral and legal doctrines of the last several centuries dictate that such a person be afforded a defense based upon his mental and, as society now knows, physical ailment.

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*morbidity, and Lack of Treatment*, 60 Psychiatry 1, 17 (1997); Jerome A. Yesavage, *Inpatient Violence and the Schizophrenic Patient: An Inverse Correlation Between Danger-Related Events and Neuroleptic Levels*, 17 Biological Psychiatry 1331 (1982); Leta D. Smith, *Medication Refusal and the Rehospitalized Mentally Ill Inmate*, 40 Hosp. and Community Psychiatry 491, 494 (1989).

[11] In a survey in which 42 outpatients with schizophrenia, all of whom were apparently taking antipsychotic medication, were compared to a matched control group of medical patients, no differences in criminal behavior were found between the two groups. Henry T. Chuang et al., *Criminal Behaviour Among Schizophrenics*, 32 Canadian J. Psychiatry 255, 257 (1987). The three-site MacArthur Foundation Study of violence and mental illness reported that discharged psychiatric patients without substance abuse had approximately the same incidence of violent behavior as other individuals living in the same neighborhoods. These patients were followed closely for a year and most were taking their medications. Henry J. Steadman et al., *Violence by People Discharged From Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 Archives Gen. Psychiatry 393, 400 (1998).

[12] Hans Schanda, *Psychiatry Reforms and Illegal Behavior of the Severely Mentally Ill*, 365 The Lancet 367 (2005).

## A. Anosognosia and Mental Illness

Anosognosia is a neurological deficit that impairs a person's ability to recognize that he is ill even when there is overwhelming evidence of his illness.[13] It has been described as "one of the most eccentric neuropsychological presentations one is likely to encounter,"[14] and as being "singularly difficult, for even the most sensitive observer, to picture the inner state . . . for this is unimaginably remote from anything he himself has ever known."[15] One neurologist described the total absence of concern in the person affected as "nothing less than astounding . . . [including] the lack of concern they show for their overall situation, the lack of emotion

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[13] Etymologically, anosognosia is derived from the Greek *nosos*, "disease," and *gnosis*, "knowledge." It literally means to not know a disease. As commonly used, it means to not know one's own disease and is used interchangeably with such terms as "lack of awareness of illness" and "lack of insight." In psychiatry, anosognosia usually connotes three overlapping dimensions: the failure to recognize that one has a psychiatric disease; the inability to recognize that one's unusual mental events, such as delusions and hallucinations, are pathological; and noncompliance with treatment. Anthony David, *Insight and Psychosis*, 156 Br. J. Psychiatry 798, 805 (1990). Other researchers have added additional dimensions to the use of the term, including failure to perceive the need for treatment, lack of awareness of the benefits of treatment, and lack of awareness of the social consequences of having a psychiatric disorder. *See* Xavier Amador & Regine Anna Seckinger, *The Assessment of Insight: A Methodological Review*, 27 Psychiatric Annals 798 (1997). As used in neurology, anosognosia has been defined as "an impaired ability to recognize the presence or appreciate the severity of deficits in sensory, perceptual, motor, affective, or cognitive functioning." *See* Susan Kotter-Cope & Cameron J. Camp, *Anosognosia in Alzheimer Disease*, 9 Alzheimer Disease Assoc. Disorders 52 (1995).

[14] Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* 62 (1995).

[15] Oliver Sacks, *The Man Who Mistook His Wife for a Hat* 5 (1998).

they exhibit, the lack of feeling they report when questioned about it."[16]

Research now has shown that patients suffering from severe and untreated mental illness who also suffer from anosognosia are unable to differentiate the false perceptions caused by psychotic symptoms, such as delusions and hallucinations, from reality, and they lack knowledge, awareness or recognition of their disease.[17] As a consequence of not being able to recognize that they are ill, these individuals frequently refuse or fail to seek treatment.[18] Consequently, anosognosia contributes to the increased risk of violence caused by untreated mental illness.[19]

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[16] Damasio, *supra* note 14, at 64. *See also* Edwin A. Weinstein & Robert L. Kahn, *Denial of Illness: Symbolic and Physiological Aspects* 18 (1955) ("Anosognosic patients seemed to maintain a serene faith that they were well which remained firm despite all disbelief by others.").

[17] Xavier Amador & Henry Kronengold, *Understanding and Assessing Insight*, in *Insight and Psychosis* 21, 26 (Xavier Amador and Anthony David, eds. 1998).

[18] "[P]oor insight in schizophrenia is associated with poorer medication compliance, poorer psychosocial functioning, poorer prognosis, increased relapses and hospitalization and poorer treatment outcomes." Robert C. Schwartz, *The Relationship Between Insight, Illness, and Treatment Outcome in Schizophrenia*, 1 Psychiatric Quarterly 19 (1998).

[19] E. Fuller Torrey, *The Relationship of Insight to Violent Behavior and Stigma*, in *Insight and Psychosis: Awareness of Illness in Schizophrenia and Related Disorders* 244 (Xavier Amador & Anthony David eds. 2004); Peter F. Buckley et al., *Insight and its Relationship to Violent Behavior in Patients with Schizophrenia*, 161 Am. J. Psychiatry 1712 (2004); Craig Goodman et al., *Insight into Illness in Schizophrenia*, 46 Comprehensive Psychiatry 284, 287 (2005); Peter F. Buckley et al., *Violent Behavior and Lack of Insight in Schizophrenia* (abstract), 67 Schizophrenia Res. 10 (2004); Julio Bobes et al., *Predictors of Number and Severity of Violence Episodes in a One-Year Follow-Up Schizophrenia Sample*, 60 Schizophrenia Res. 333 (2003).

As is not uncommon with the scientific process, it has taken decades of research for scientists to establish the link between anosognosia, risk of violence, and the untreated mentally ill. In the nineteenth and early twentieth centuries, there were observations made that individuals with what was then simply called "insanity" were often unaware of their own illness, but connection to anosognosia was not then made.[20] By the early twentieth century, psychiatrists occasionally noted lack of insight in psychiatric patients. Emil Kraepelin, for example, in his classic 1919 textbook, observed that "understanding of the disease disappears fairly rapidly as the malady progresses in the overwhelming majority of cases, even where in the beginning it was more or less clearly present."[21]

At the time Kraepelin published his textbook, the writings of Sigmund Freud already were circulating in Europe and the United States. Freud taught that denial was one of the most common and important defense mechanisms

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[20] In 1869, an article in the *American Law Review* noted: "Generally, insane people do not regard themselves as insane and, consequently, can see no reason for their confinement other than the malevolent designs of those who have deprived them of their liberty." Anonymous, *Confinement of the Insane*, 3 Am. Law Rev. 193, 215 (1869). Some psychiatrists of that period even suggested that lack of awareness of one's insanity should be the central criterion for the form of insanity then labeled "moral insanity." For a discussion of this, *see* German E. Berrios, *The History of Mental Symptoms* 242–49, 257–59 (1996). This view was an echo of Thomas Dekker's 1604 play, *The Honest Whore*, in which a character declaims: "That proves you mad because you know it not." Thomas Dekker, *The Honest Whore* act 4 sc. 3 (1604), *available at* http://www.tech.org/~cleary/1hw.html, cited by J. Thomas Dalby, *Elizabethan Madness on London's Stage*, 81 Psychol. Rep. 1331, 1333 (1997).

[21] Emil Kraepelin, *Dementia Praecox and Paraphrenia* 26 (E & S Livingstone ed. 1971) (originally published in 1919). Kraepelin also quotes one of his patients as saying: "Whoever thinks that I am mad, is himself mad." *Id.* at 22.

used by people. As Freud's theories became more widely known, the concept of denial became increasingly influential and was invoked to explain why individuals with schizophrenia and other severe psychiatric disorders did not acknowledge their illnesses. Denial as a psychological defense mechanism continued to be a prominent psychiatric explanatory principle throughout the twentieth century.[22] Thus, in the 1960s and 1970s, when state laws governing the treatment of psychiatric patients were undergoing changes, there was no discussion regarding the possibility that unawareness of one's illness might be a biologically-based symptom of the illness rather than denial. The concept of anosognosia simply did not exist in the corpus of psychiatric writings.

In the early 1990s, anosognosia rapidly ascended to prominence in psychiatric literature. Xavier Amador, a psychologist at Columbia University in New York, and Anthony David, a psychiatrist at the Institute of Psychiatry in London, began studies with their colleagues that have continued to the present.[23] Both groups developed assessment tools that can be used to measure awareness of illness: the Scale to Assess Unawareness of Mental Illness and the Schedule for the Assessment of Insight, respectively.[24] The availability of in-

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[22] *See generally* E. Fuller Torrey, *Freudian Fraud: The Malignant Effect of Freud's Theory on American Thought and Culture* (1999).

[23] *See generally* Amador & Kronengold, *supra* note 17, at 26.

[24] Xavier Amador et al., *Assessment of Insight in Psychosis*, 150 Am. J. Psychiatry 873 (1993); Xavier Amador et al., *Awareness of Illness in Schizophrenia*, 17 Schizophrenia Bull. 113 (1991); Anthony David et al., *The Assessment of Insight in Psychosis*, 161 Br. J. Psychiatry 599 (1992). In addition to these scales, others have also been proposed. Comparison studies have reported a high degree of inter-correlation between the scales. *See* M. Sanz et al., *A Comparative Study of Insight Scales and Their Relationship to Psychopathological and Clinical Variables*, 28 Psychol. Med. 437 (1998).

struments that can be used to measure anosognosia in large groups of patients has advanced this research area rapidly.

## B. Anosognosia and Schizophrenia

It was not until the 1980s that anosognosia was clearly linked to mental illness, specifically schizophrenia. Joseph McEvoy, a psychiatrist at the University of Pittsburgh, began investigating the link between lack of awareness of illness and the need for involuntary treatment in individuals with schizophrenia. McEvoy found that "committed patients require coercive hospitalization because they fail to recognize their need for care."[25]

There has been an emerging consensus regarding the percentage of individuals with schizophrenia who have anosognosia. A study carried out by Amador and his colleagues reported that fifty-seven percent of patients with schizophrenia "had moderate to severe unawareness of having a mental disorder."[26] Another study of eighty-seven stable outpatients with schizophrenia found that fifty percent "were rated as having at least a moderate impairment in insight about their illness."[27] Another study directly compared

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[25] Joseph P. McEvoy et al., *Why Must Some Schizophrenic Patients Be Involuntarily Committed? The Role of Insight*, 30 Compr. Psychiatry 13, 16 (1989); Joseph P. McEvoy et al., *Measuring Chronic Schizophrenic Patients' Attitudes Toward Their Illness and Treatment*, 32 Hosp. Community Psychiatry 856 (1981).

[26] Xavier Amador et al., *Awareness of Illness in Schizophrenia and Schizoaffective and Mood Disorders*, 51 Archives Gen. Psychiatry 826, 828–29 (1994).

[27] Faith B. Dickerson et al., *Lack of Insight Among Outpatients with Schizophrenia*, 48 Psychiatric Services 195, 197 (1997). Similarly, the large MacArthur treatment competence study found that approximately half of the individuals with schizophrenia lacked an understanding of their illness and/or an appreciation of the importance of treatment. Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Com-*

patients with schizophrenia to patients with focal neurological disorders, such as strokes and brain tumors, on awareness of their illnesses. Among the patients with schizophrenia, forty-seven percent were unaware of their illness, while among the neurological patients, fifty-seven percent were unaware.[28]

These studies demonstrate that approximately half of all individuals with schizophrenia have moderate to severe impairment in awareness of their illness. Moreover, the studies suggest that this impairment in awareness occurs somewhat more often in individuals whose symptoms of schizophrenia are more severe, but that it is not a direct product of delusions, depression, or other symptoms.[29] Rather, the impairment in awareness of illness seen in individuals with schizophrenia is itself a symptom of the disease and is true anosognosia.[30]

## C. Consequences of Anosognosia for the Mentally Ill

It increasingly has been recognized that anosognosia has adverse consequences directly correlated to the refusal of treatment for the patient's underlying illness. Individuals who are unaware of their untreated brain disorder often refuse treatment and are more likely to behave in a manner that endangers themselves and those around them. For individuals with untreated schizophrenia, for example, the conse-

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*petence Study: III. Abilities of Patients to Consent to Psychiatric and Medical Treatments,* 19 Law & Hum. Behav. 149 (1995).

[28] Xavier Amador et al., *Awareness Deficits in Neurological Disorders and Schizophrenia* (abstract), 24 Schizophrenia Res. 96 (1997).

[29] Alisa R. Mintz et al., *Insight in Schizophrenia: A Meta-Analysis,* 61 Schizophrenia Res. 75, 83 (2003).

[30] Amador & Kronengold, *supra* note 17, at 26.

quences of anosognosia may include noncompliance with medication, relapse, incarceration and violent behavior.

### a. *Noncompliance with Medication*

There are many reasons why people do not take medication that has been prescribed for them. For individuals with schizophrenia, however, the main reason they do not take medication is anosognosia—they simply cannot believe they are sick and therefore they do not believe they need treatment.[31]

Studies have identified lack of awareness of illness as a major determinant of medication noncompliance in individuals with schizophrenia.[32] In one study, individuals who were unaware of their illness were only half as likely to take medication compared to individuals who were aware.[33] In another study, sixty-three percent of psychiatric patients with anosognosia were noncompliant with medications compared to a twenty-four percent noncompliance rate for patients who were aware of their illness.[34]

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[31] R. Kessler et al., *The Prevalence and Correlates of Untreated Serious Mental Illness*, 36 Health Services Res. 987 (2001); Treatment Advocacy Center, *What Percentage of Individuals With Severe Mental Illnesses Are Untreated and Why*, http://www.psychlaws.org/BriefingPapers/BP13.pdf (last visited January 27, 2006).

[32] Joseph P. McEvoy, *The Relationship Between Insight Into Psychosis and Compliance with Medications*, in *Insight and Psychosis: Awareness of Illness in Schizophrenia and Related Disorders* 312 (Xavier Amador and Anthony David, eds. 2004).

[33] Ih Foo Lin et al., *Insight and Adherence to Medication in Chronic Schizophrenics*, 40 J. Clinical Psychiatry 430, 431 (1979).

[34] H. Rittmannsberger et al., *Medication Adherence Among Psychotic Patients Before Admission to Inpatient Treatment*, 55 Psychiatric Services 174, 177 (2004).

### b. *Relapse and Incarceration*

Since treatment of mental illness has been shown to drastically reduce episodes of violence, and individuals with schizophrenia who have impaired awareness of illness are less likely to be compliant with helpful medication, it logically follows that those suffering from both mental illness and anosognosia are more likely to be arrested and incarcerated.

Individuals with schizophrenia and other psychiatric disorders who are noncompliant with medication have significantly more frequent and severe relapses compared to individuals who are compliant.[35] A 1998 Department of Justice survey reported that sixteen percent of inmates in the nation's jails and prisons were mentally ill.[36] This includes a growing number of mentally ill repeat offenders, such as Gloria Rodgers, who in 1998 was reported to have had 258 previous arrests and to have been jailed 114 times in the previous four years.[37]

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[35] D.A.W. Johnson et al., *The Discontinuance of Maintenance Neuroleptic Therapy in Chronic Schizophrenic Patients: Drug and Social Consequences*, 67 Acta Psychiatrica Scandanivica 339, 347-48 (1983); *see also* McEvoy et al., *Why Must Some Schizophrenic Patients Be Involuntarily Committed? The Role of Insight*, *supra* note 25, at 16; McEvoy et al., *Measuring Chronic Schizophrenic Patients' Attitudes Toward Their Illness and Treatment*, *supra* note 25.

[36] Paula M. Ditton, Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, *Mental Health and Treatment of Inmates and Probationers* (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf. Since the nation's jail and prison population now includes more than two million individuals, that would mean that approximately 320,000 inmates are mentally ill.

[37] *Graphic Lesson: Assault Sharpens Debate Over Jailed Mentally Ill*, The Commercial Appeal, A10 (Memphis, TN), Oct. 28, 1998.

To TAC's knowledge, no study has specifically assessed awareness of illness among mentally ill prisoners. There is evidence, however, that such individuals tend to have been noncompliant with medication prior to their arrest.[38] One study of mentally ill individuals who have been arrested found that "two highly significant predictors of arrest were substance abuse . . . and noncompliance with medication."[39]

A study of sixty-five patients with severe psychiatric disorders discharged from an Ohio state psychiatric hospital illustrates the problem. Within six months, thirty-three of the sixty-five individuals had become homeless, and twenty-one of these thirty-three had been arrested and jailed. Most of them had been arrested for misdemeanors, such as threatening and bizarre behaviors. The authors of the report noted that "psychotropic medication had been prescribed upon their discharges from the state hospital, but the respondents failed to take their medication."[40]

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[38] Mark R. Munetez et al., *The Incarceration of Individuals with Severe Mental Disorders*, 37 Community Mental Health J. 361, 366 (2001).

[39] Bentson H. McFarland et al., *Chronic Mental Illness and the Criminal Justice System*, 40 Hosp. Community Psychiatry 718, 720 (1989). Such individuals tend to be arrested for misdemeanors such as disorderly conduct and threatening people. For example, one young man smashed a store window "because he saw a dinosaur jumping out at him," and a young woman refused to pay for her meal in a restaurant because she claimed to be "the reincarnation of Jesus Christ." *See* Gary E. Whitmer, *From Hospitals to Jails: The Fate of California's Deinstitutionalized Mentally Ill*, 50 Amer. J. Orthopsychiatry 65, 66 (1980), and Edwin V. Valdiserri et al., *A Study of Offenses Committed by Psychotic Inmates in a County Jail*, 37 Hosp. Community Psychiatry 163, 165 (1986).

[40] John R. Belcher, *Are Jails Replacing the Mental Health System for the Homeless Mentally Ill?*, 24 Community Mental Health J. 185, 192

### c. *Violent Behavior*

Violent behavior by individuals with schizophrenia and other severe psychiatric disorders is a tragic consequence of anosognosia. In recent years studies have linked violent behavior directly to impaired awareness of illness. One study, carried out in Ohio, assessed 122 patients with schizophrenia who had committed violent acts and compared them with 111 patients with schizophrenia who had not committed such acts. The violent patients had more symptoms and significantly less awareness of their illness.[41] A second study, carried out in New York, examined causes of behavior in sixty severely mentally ill men who had been charged with violent crimes. The author reported that lack of awareness of illness and medication noncompliance both played significant roles in causing the men's violent behavior.[42] A study carried out in Spain on sixty-three patients with schizophrenia admitted to a psychiatric hospital assessed both their violent behavior and their awareness of illness. The authors reported a statistically significant association between impaired awareness of illness and increased violent acts and concluded that "the single variable that best predicted violence was [impaired] insight into psychotic symptoms."[43]

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(1988). Substance abuse was also a major problem among this group and contributed to their homelessness and incarceration.

[41] Lee Friedman et al., *Psychometric Relationships of Insight in Patients with Schizophrenia Who Commit Violent Acts* (abstract), 60 Schizophrenia Res. 81 (2003).

[42] Nelly Alia-Klein, *Violence and Psychosis in Relationship to Insight into Illness and Medication Compliance* (submitted for publication, on file at the Treatment Advocacy Center).

[43] Celso Arango et al., *Violence in Inpatients with Schizophrenia: A Prospective Study*, 25 Schizophrenia Bull. 493, 500 (1999).

There is abundant evidence that medication noncompliance is also linked to increased violent behavior. Anecdotal stories abound and are frequently seen in media accounts of tragedies, *e.g.*, "his daughter was not taking her medication at the time of the slaying."[44] There also are multiple studies showing that individuals with severe psychiatric disorders who are unmedicated or undermedicated are significantly more likely to commit violent acts.[45] Persons suffering from anosognosia are more likely to be noncompliant with medication.[46]

## III. A CRIMINAL DEFENSE BASED ON SEVERE MENTAL ILLNESS IS NECESSARY BOTH TO PROTECT SOCIETY AND TO ADDRESS THE TREATMENT NEEDS OF THE MENTALLY ILL.

As set forth herein, anosognosia increases the likelihood that victims of severe mental illness will reject or fail to seek treatment. This problem is exacerbated by antiquated state civil commitment laws that forbid treatment interventions until individuals pose an immediate physical danger to themselves or others. Because untreated severe mental illnesses are closely correlated to an increased risk of violence, anosognosia and these commitment laws operate together to

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[44] *Crofton Woman Found Guilty in Mother's Slaying*, Washington Post, Sept. 28, 1990, at D3; *see also* Jay Apperson, *Woman Not Criminally Liable for Ax Murder of Mother*, Baltimore Sun, Sept. 26, 1990, at 4. *See generally Parents Say Newton Man in Stab Attack Failed to Take Meds*, Boston Herald, Dec. 31, 2005, at 10.

[45] John A. Kasper et al., *Prospective Study of Patients' Refusal of Antipsychotic Medication Under a Physician Discretion Review Procedure*, 154 Am. J. Psychiatry 483, 486, 488 (1997); T. Steinert et al., *How Common Is Violence in Schizophrenia Despite Neuroleptic Treatment?*, 33 Pharmacopsychiatry 98, 100–01 (2000).

[46] McEvoy, *supra* note 32, at 328.

ensure that mental illness will cause some of those it afflicts to engage in criminal behavior.

Some states are reacting to the tragic ramifications of untreated mental illnesses, and consequently anosognosia, by adopting more comprehensive commitment schemes with less restrictive, more flexible standards. New York's improved law, known as Kendra's Law, has resulted in dramatic reductions in incarceration, arrests, homelessness and hospitalizations of the severely mentally ill.[47] Extensive clinical research has found analogous outcomes for reformed commitment laws in numerous states.[48]

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[47] *See* N.Y. Mental Hyg. Law § 9.60 (Consol. 2005). Individuals in the first five years of New York's assisted outpatient treatment ("AOT") program experienced fewer hospitalizations (seventy-seven percent), episodes of homelessness (seventy-four percent), arrests (eighty-three percent), and incarceration (eighty-seven percent), and had improved medication compliance (fifty percent) and participation in substance abuse treatment (sixty-five percent). Fifty-five percent fewer recipients engaged in suicide attempts or physical harm to themselves. Three out of every four of the program participants reported that Kendra's Law had helped them regain control of their lives; four out of five said that AOT helped them to get and stay well. *See* New York State Office of Mental Health, *Kendra's Law: Final Report on the Status of Assisted Outpatient Treatment* (2005), *available at* http://www.omh.state.ny.us/omhweb/Kendra_web/finalreport/AOTFinal2005.pdf.

[48] *See, e.g.*, Marvin S. Swartz et al., *Can Involuntary Outpatient Commitment Reduce Hospital Recidivism?*, 156 Am. J. Psychiatry 1968, 1973 (1999) (hospital admissions reduced by fifty-seven percent when used for at least six months and combined with routine mental health services); Jeffrey Swanson et al., *Involuntary Out-Patient Commitment and Reduction of Violent Behaviour in Persons With Severe Mental Illness*, 176 Brit. J. Psychiatry 224 (2000) (assisted outpatient treatment of six months or more combined with routine outpatient services reduced the incidence of violence in half (twenty-four percent versus forty-eight percent)); Jeffrey Swanson et al., *Can Involuntary Outpatient Commitment Reduce Arrests Among Persons with Severe Mental Illness?*, 28 Crim. Just. & Behav. 156, 182–83 (2001) (same); Virginia A. Hiday et

TAC respectfully submits that reforms such as these, as opposed to unduly limiting—if not completely obliterating—the insanity defense, are the proper method to balance safety concerns of States with the due process rights of the mentally ill.

## CONCLUSION

Anosognosia has important consequences for individuals with schizophrenia and other severe psychiatric disorders. Since treatment drastically reduces the likelihood of violence, non-treatment—which often is caused by anosognosia—is a major determinant of violent behavior and has a direct impact on the moral culpability of criminal defendants. This neurologically-based problem must be considered as the Court engages in balancing the due process rights of mentally ill defendants with the rights of States to regulate potentially dangerous behavior. As centuries of common law have taught, punishing those who cannot even recognize their own

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al., *Impact of Outpatient Commitment on Victimization of People with Severe Mental Illness*, 159 Am. J. Psychiatry 1403 (2002); Gustavo A. Fernandez & Sylvia Nygard, *Impact of Involuntary Outpatient Commitment on the Revolving-Door Syndrome in North Carolina*, 41 Hosp. and Community Psychiatry 1001, 1003 (1990) (median readmissions decrease from 3.7 to 0.7 per 1,000 days); Virginia A. Hiday & Teresa L. Scheid-Cook, *The North Carolina Experience with Outpatient Commitment: A Critical Appraisal*, 10 Int'l J. Law & Psychiatry 215, 229 (1987) (over six months, thirty percent medication refusal versus sixty percent absent orders); Robert A. Van Putten et al., *Involuntary Outpatient Commitment in Arizona: A Retrospective Study*, 39 Hosp. & Community Psychiatry 953, 957 (1988) ("almost no patients" without orders voluntarily maintain treatment in mental health system versus seventy-one percent who do in group with orders); Guido Zanni & Leslie deVeau, *Inpatient Stays Before and After Outpatient Commitment*, 37 Hosp. & Community Psychiatry 941, 942 (1986) (hospital readmissions decrease from 1.81 to 0.95 per year).

illness, without careful consideration of their mental illness, cannot comport with constitutional due process.

Respectfully submitted.

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January 30, 2006

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No. 05-5966

SUPREME COURT, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner,*

vs.

STATE OF ARIZONA,

*Respondent.*

**On Writ Of Certiorari To The Arizona Court Of Appeals**

## PETITIONER'S OPENING BRIEF

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

(2) Whether Arizona's insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

## PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption of this matter.

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## OPINIONS BELOW

The Arizona Court of Appeals' decision affirming Petitioner Eric Clark's conviction and sentence is unpublished. *State v. Clark*, No. 1 CA-CR 03-0851 and 1 CA 03-0985 (consolidated) (Ariz. App., Div. 1, January 25, 2005.) (JA 336-54.) The Arizona Supreme Court's order denying discretionary review (JA 355) is also unpublished. *State v. Clark*, No. CR 05-0047 PR (Ariz., May 25, 2005).

## JURISDICTION

The petition for *certiorari* was filed on August 17, 2005 and granted on December 5, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV provides in pertinent part:

> . . . [N]or . . . shall any state deprive any person of life, liberty, or property, without due process of law . . .

Section 13-1105(A)(3) of the Arizona Revised Statutes (1996) provides in pertinent part that a person commits first-degree murder if:

> Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

Section 13-502(A) of the Arizona Revised Statutes (1996) provides in pertinent part:

> A. A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. . . .

## STATEMENT OF THE CASE

On June 21, 2000, 17-year-old Eric Clark shot and killed Flagstaff Police Officer Jeffrey Moritz. Eric was charged with first-degree murder under A.R.S. § 13-1105(A). The Indictment alleged that he "intentionally or knowingly" caused the death of a police officer while in the line of duty. (ROA-Doc 3.) After a bench trial, the Superior Court convicted him of this offense and found that he had not carried his burden of proving that he was "guilty except insane" under ARS § 13-502. (JA 331-35.) (The trial was conducted in two phases, the first to determine guilt or innocence, the second to determine sanity. The court's findings on both issues were made at the conclusion of the entire trial.) The Arizona Court of Appeals affirmed Eric's conviction and resulting sentence of life imprisonment, finding the prosecution's evidence sufficient to "support the conclusion that . . . [he] knowingly and intentionally shot Moritz and knew that he was a police officer when he did so" (JA 342) and that Eric "did not prove by clear and convincing evidence that he was insane pursuant to ARS § 13-502(A) at the time of the crime"

(JA 347). After the Arizona Supreme Court denied discretionary review (JA 355), this Court granted *certiorari*.

## A. The Facts

The tragic shooting death of Officer Moritz occurred at 4:51 a.m. He had responded in uniform in his marked patrol car as a result of 911 calls from a residential neighborhood complaining that a vehicle was continuously driving around the block blaring loud music. The officer located the vehicle (a pickup truck) and stopped it after activating his emergency lights. About a minute after the officer left the patrol vehicle there was an exchange of gunfire. Officer Moritz was struck by a bullet that impaired two of the four major blood vessels serving his brain and killed him. (JA 338-39.)

There was no dispute at trial that Eric Clark was the driver of the pickup truck and the person who shot Officer Moritz. There was also no dispute that at the time of the episode Eric was suffering from chronic paranoid schizophrenia[1] and was actively psychotic[2]. The prosecution

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[1] "Schizophrenia is an extremely serious psychosis that is characterized by grossly distorted perceptions of reality, a withdrawal from social interaction, and a fragmentation of perceptions, thought, and reality." *Sanders v. State*, 585 A.2d 117, n. 2 (Del.Super. 1990) *citing* J. Coleman, J. Butcher & R. Carson, ABNORMAL PSYCHOLOGY AND MODERN LIFE 395 (6th ed. 1980). "Hallucinations, delusions, nonsensical speech, violent or self-destructive behavior, and a loss of motor control are all common symptoms." *Id. citing* Day & Semard, SCHIZOPHRENIC REACTIONS, THE HARVARD GUIDE TO MODERN PSYCHIATRY 199, 210-13 (A. Nicholi ed. 1978).

[2] "[P]sychosis is a general term that describes an individual who has gross disturbance in their reality testing and usually, that's manifested by a combination of delusions and hallucinations." (RT 8/22/03 at 17-18; JA 15.)

conceded these facts (RT 8/27/03 at 33-34, 39, 48, 58/JA 302-03, 306, 313, 330-31); and the prosecution's expert forensic psychologist diagnosed it independently of, but in conformity with, the defense expert psychiatrist (RT 8/26/03 at 39, 35, 38, 89-91, 94, 133, 163-64, 172-74/JA 132-33, 135-36, 179-81, 184, 219-20, 246-47, 254-57). The trial judge found that:

> "Both experts, all lay witnesses, and the attorneys agree that the Defendant suffers from a qualifying mental disease: paranoid schizophrenia. The Defendant clearly began suffering from this illness well before June 21, 2000 and suffered from the illness at the time of shooting Officer Moritz." (JA 332)

The Arizona Court of Appeals concurred (JA 345).

Until about a year and a half before the shooting, Eric had been a healthy, well-adjusted teenager who got good grades, excelled in sports, was popular and had no significant problems at school or at home.[3] After his illness struck he began to have inexplicable mood swings and episodes where with a strange look in his eyes he screamed, or whispered audible gibberish.[4] His alarmed parents eventually had him arrested, taken to a juvenile facility and transferred to a psychiatric hospital. He was later released against medical advice.[5] He developed the belief that he was being poisoned, and that "They" were

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[3] See, *e.g.*, RT 8/20/03 at 9-11, 53-56, 61, 87-89, 133-34, 165-66, 180, 195, 214-15.

[4] See, *e.g.*, RT 8/20/03 at 15, 17, 91-97, 113, 115, 182-86, 197; Day 8, pp. 16-17.

[5] See, *e.g.*, RT 8/20/03 at 97-100, 143-45, 202-08.

"after him."[6] He would not sleep in his bedroom but retreated into the small computer room in his home, where he tied up a fishing line with beads and wind chimes to alert him to intrusion by invaders.[7] He later returned to his room but equipped it with the same alarm apparatus.[8] He began to leave the TV on all the time, "loud," and he turned up the car radio "real loud."[9]

Teachers and friends began to talk about his numerous episodes of bizarre behavior;[10] he became a friendless loner;[11] his vocabulary and even his physical appearance noticeably changed.[12] He began to reveal his belief that the Earth had been invaded by aliens, that Flagstaff was populated by aliens, that the aliens were trying to capture

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[6] See, *e.g.*, RT 8/20/03 at 29, 101, 116, 135, 209, 210; RT 8/22/03 at 33, 38-39/JA 27-28, 31-32; RT 8/26/03 at 166, 170/JA 24-50, 253.

[7] See, *e.g.*, RT 8/20/03 at 100-01, 211.

[8] See, *e.g.*, RT 8/21/03 at 6: "[W]hen he moved back into his bedroom, he had taken eye hooks and screwed them in the walls, crisscrossed all around his room, and had taken fishing line and had strung fishing line crisscrossing all around his room through the eye hooks, and then had taken craft beads and strung the craft beads strategically on various points along this fishing line. He had taken beverage glasses from the kitchen, and when he closed the door to his room, would stack the beverage glasses . . . in front of the door if you were inside the room, and along the window sill so that if you opened the door, he had – he also had wind chimes on this string, the wind chimes would ring, the beads would move, the glasses would fall. . . ." See also RT 8/22/03 at 40/JA 33; RT 8/26/03 at 18, 166-67/JA 118-19, 249-50.

[9] See, *e.g.*, RT 8/20/03 at 65, 92, 124; RT 8/22/03 at 39/JA 32-33.

[10] See, *e.g.*, RT 8/20/03 at 23, 27-28, 177, 219-20.

[11] See, *e.g.*, RT 8/20/03 at 61-62, 166-67, 182-83, 214-15; RT 8/21/03 at 68-69.

[12] See, *e.g.*, RT 8/20/03 at 62-64, 166-67; RT 8/21/03 at 68-69.

and kill him, and that even his parents were aliens.[13] His fear that the aliens would poison him was such that he would not eat anything at home except food from sealed packages. He started going to the Sizzler to eat because he thought he would be safe from poisoning where the general public ate.[14]

For months prior to the shooting of Officer Moritz, Eric's parents tried to have him recommitted. His mother repeatedly consulted a lawyer in efforts to have the county attorney press charges so that he would be forced into mental health counseling.[15] During the two days before the shooting Eric's parents called at least five facilities and twice contacted the lawyer's office, "frantic, basically, and said I had to see you that day and Eric was deteriorating so fast that I had to figure out a way to get him some help."[16] The prosecution's expert witness testified at trial that, had it not been for the shooting and its aftermath,

> "I think his family probably would have been able to keep him at a higher level of functioning. They probably would have gotten the courts involved. The courts probably would have had him institutionalized against his wishes because he was a danger to himself. And, hopefully, some

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[13] See, *e.g.*, RT 8/20/03 at 110-12, 131-32, 136, 226-27; RT 8/22/03 at 25, 29, 32, 38-39, 47-48, 55, 72-73/JA 21, 24, 26-27, 31-32, 38-40, 45, 60-61; RT 8/26/03 at 19-21, 103-09, 136-37, 142, 166-70, 172-73, 179-80/JA 119-21, 192-97, 222-23, 227-28, 249-53, 255-56, 261-62.

[14] See, *e.g.*, RT 8/20/03 at 101, 107-08, 130; RT 8/26/03 at 136-37, 158/JA 222-23, 242.

[15] See, *e.g.*, RT 8/20/03 at 221-25, 232-34.

[16] RT 8/20/03 at 225-26. Regarding the calls to the medical facilities, see the discussion of the phone records (id. at 232-34).

> higher level of functioning could have been preserved." (RT 8/26/03 at 201/JA 280.)

Instead, Eric shot and killed Officer Moritz in the early morning of June 21, 2000.

## B. The Proceedings Below

Eric was initially found incompetent to stand trial, civilly committed, and was hospitalized for nearly three years before his competency was restored.[17] When the prosecution resumed, Eric's attorneys sought to present evidence of his mental illness for two purposes: (1) to cast doubt on the prosecution's proof that Eric intentionally or knowingly killed a police officer (ROA-Doc 362; RT 8/5/03 at 16-18); and (2) to establish the affirmative defense of insanity ("Guilty Except Insane" [hereafter, "GEI"]) under ARS § 13-502. (ROA-Doc 257; RT 8/5/03 at 16-18). The

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[17] Immediately after Eric's arrest he was determined in separate mental-health proceedings (before a different trial judge) to be suffering from psychosis and paranoid schizophrenia and therefore gravely disabled and a danger to himself and others. As a result of that proceeding (pursuant to Title 36 of the Arizona Revised Statutes), he was committed to the Arizona State Hospital for treatment. (Cause MH 2000-0080, RT 9/19/00 at 124-27.) He was also determined by the trial judge, in separate proceedings pursuant to Rule 11 of the Arizona Rules of Criminal Procedure, to be incompetent to stand trial and was further committed to the Arizona State Hospital for treatment and restoration to competency – a course of treatment that took almost three years. (ROA-Docs 16, 18, 156-57, 253; RT 3/28/01 at 2-6; RT 8/8/01 at 2-3; RT 6/26/02, 7/10/02, 7/11/02.) Ultimately, he was determined to be competent and was tried to the court without a jury. (ROA-Docs 304-05; RT 5/8/03 at 2-3; RT 7/28/03 at 2-11.) The parties stipulated that the court could consider all previous mental-health testimony including that before the court in the competency and Title 36 proceedings, all of which were part of the record on direct appeal. (See, ROA-Doc 358; Arizona Court of Appeals Order dated 1/28/04.)

trial court requested briefing by the parties of the legal issues raised by the potential use of Eric's mental-illness evidence. (ROA-Doc 373.)

The prosecution informed the court that in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), the Arizona Supreme Court had "held that the insanity test is the sole standard for criminal responsibility in Arizona" and "specifically rejected the argument that evidence of diminished capacity could be presented to negate intent or knowledge." (ROA-Doc 376 at 2.) The government asserted that "[i]n the instant case, defendant is attempting to present evidence of his purported delusions to negate the mental state of intending or knowing required under ARS § 13-1105(A)(3) . . . [and s]uch evidence would be that of diminished capacity which is not permissible under Arizona law." (Id. at 3.) It added that "*Mott* further held that the Federal Constitution was not violated by the exclusion of diminished capacity evidence." (Id.)[18] Defense

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[18] *Mott* involved a defendant's contention that in a prosecution for child abuse and felony first-degree murder, that she was entitled to present "expert psychological testimony that as a battered woman, she was unable to form the requisite mental state necessary for the commission of the charged offenses." (187 Ariz. at 538, 931 P.2d at 1048.) An intermediate state appellate court had sustained this contention, "finding that the trial court's preclusion of defendant's proffered testimony regarding battered-woman syndrome violated due process." (187 Ariz. at 539, 931 P.2d at 1049.) The Arizona Supreme Court recognized that Mott's evidence of her "history of being battered and of her limited intellectual ability was not offered as a defense to excuse her crimes but rather as evidence to negate the *mens rea* element of the crime." (187 Ariz. at 540, 931 P.2d at 1050.) It held that Arizona criminal defendants are not permitted to present "'*diminished capacity*'" evidence of this kind because the Arizona legislature's enactment of an insanity defense with a particular definition of exculpatory insanity – together with the legislature's failure to enact a provision of the Model Penal Code which explicitly authorized a

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counsel's response was that, notwithstanding the *Mott* decision, the GEI statute and *Mott* prohibition violated Eric's rights to present a complete defense and he was preserving for appeal the contention that these limitations violated his state and federal constitutional Due Process rights. (ROA-Doc 374 at 2-3.) After considering these submissions, the trial judge announced that:

> (1) the court was bound by *Mott* to consider Eric's mental-illness evidence only insofar as it bore upon the issue of whether Eric was GEI under ARS § 13-502 and not for any other purpose;
>
> (2) the court would receive any mental-health evidence that Eric's lawyers wished to present, since (a) most or all of the same evidence forbidden by *Mott* was also relevant to the GEI defense, and (b) since the judge was the fact finder he could separate proper from improper uses of the evidence avoiding prejudice to the prosecution;
>
> (3) the court would allow the defense to make additional evidentiary offers of proof at the end of the trial; and
>
> (4) all evidence proffered during trial would be preserved for any challenge to *Mott* or the trial judge's reading of *Mott* on appeal.[19]

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defendant's proof of mental disorder to prove that s/he did not have a mental state that is an element of an offense (see note 29 *infra*) – manifested an intent to preclude such evidence (187 Ariz. at 540-41, 931 P.2d at 1050-51), and that the preclusion does not violate defendants' federal Due Process rights (187 Ariz. at 541-42, 931 P.2d at 1051-52).

[19] See RT 8/18/03 at 5-6/JA 6-7:

"THE COURT: What I have intended or what I'm going to do after reading all the Mott case is – and recognizing that

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Under Arizona law the standard for determining whether a defendant is insane is whether s/he is afflicted by a qualifying illness and as a result "did not know the criminal act was wrong." ARS § 13-502(A). Applying this standard to the evidence,[20] the trial judge found that Eric was guilty of first-degree murder as charged since he had not proven his affirmative defense of GEI. (ROA-Doc 392/ JA 331-35.) By a post-trial motion to vacate, Eric renewed his federal Due Process challenges to the narrowness of the GEI standard (ROA-Doc 406 at 5-7), and to the refusal

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> much of the evidence that you're going to be submitting, in fact all of it, as far as I know, . . . that has to do with the insanity could also arguably be made along the lines of the Mott issues as to form and [sic] intent and his capacity for the intent. I'm going to let you go ahead and get all that stuff in because it goes to the insanity issue and because we're not in front of a jury. At the end, I'll let you make an offer of proof as to the intent, the Mott issues, but I still think the supreme court decision is the law of the land in this state. . . . I will certainly allow you to preserve the issue; you can argue or not argue, but you can make an offer of proof at the conclusion of the case, but I don't think it's the law of the land at this point. And then at least that preserves it on appeal if something happens later on down the road. But right now I'm bound by the supreme court decision in Mott and we will be focusing, as far as I'm concerned, strictly on the insanity defense."

[20] Portions of the evidence are quoted or summarized later in this brief in connection with the specific issues to which they are relevant. Because the evidence presented at the trial and the other materials in the record (see note 17 *supra*) were sufficient to frame the issues for appellate review court on the limited factual issues the trial court held it could consider under ARS § 13-502 and *Mott*, defense counsel made no additional "offer of proof" (see note 19 *supra*) at the conclusion of the case but preserved Eric's legal contentions by asking the court to consider all of the evidence presented in determining whether the state had proved its case and also by filing a motion to vacate judgment and sentence that cited the federal constitutional authorities and precedents. (RT 8/27/03 at 4-6; ROA-Doc 406 at 5-10.)

of the trial judge to consider his evidence of mental illness in deciding whether the prosecution had proved the *mens rea* elements of first-degree murder (Id. at 7-10). He raised the same federal contentions on appeal, and the Arizona Court of Appeals rejected them on the merits. (JA 347-50, 351-53.)

## SUMMARY OF THE ARGUMENT

I.A. Putting broader issues aside, the manner in which Arizona's rules governing the consideration of a criminal defendant's evidence of mental illness were applied at Eric Clark's trial to deny him any semblance of a fair proceeding. The prosecution was permitted to prove mental elements of the offense by urging that they could be inferred from Eric's behavior, while Eric was not permitted to contest those factual inferences by urging that his mental illness provided alternative explanations for the same behavior. This was a violation of his Due Process right to dispute the prosecution's case in an adversarial trial of the facts.

I.B. Even if the prosecution had not proved inferentially the mental elements of the crime charged, Eric could not fairly be precluded from relying upon evidence of his severe mental illness to cast doubt upon the prosecution's proof of *mens rea*. If a State makes certain conduct criminal only when it is performed with a specific state of mind, it cannot deny defendants the right to argue to a trier of fact that their mental impairments prevented them from actually, subjectively having the culpable state of mind. Categorical exclusion of reliable mental-health evidence pertinent to statutorily defined *mens rea* issues cannot

plausibly be justified as a redefinition of the crimes rendering those issues irrelevant. It is instead an arbitrary exclusionary rule of evidence that interferes with defendants' rights to present a complete defense, and offends *procedural* Due Process.

I.C. If viewed alternatively as a substantive redefinition of all the *mens rea* elements in a State's criminal code, this type of categorical exclusionary rule would be so irrational as to violate *substantive* Due Process. A state cannot consistent with Due Process define crimes as a physical act committed by a normal person if (but only if) s/he has a culpable state of mind and simultaneously punish acts committed by a psychotic person lacking any coherent state of mind. Such a criminal regulation that punishes the mentally ill without the requisite *mens rea* is abhorrent to traditional, fundamental Anglo-American principles of ordered liberty.

II. Historical and contemporary notions of the necessary conditions for just criminal punishment also restrict a State's power to abrogate the core features of the immemorial insanity defense recognized in the Anglo-American tradition and reflective of the principle that our culture does not impose serious criminal liability in the absence of *some* degree of fault. To punish people who are too sick to know what they are doing represents an unacceptable break with that tradition. Arizona's abolishment of a significant aspect of the deeply rooted *M'Naghten* test violates Due Process.

III. Arizona has *both* cut the core out of the historical Anglo-American insanity defense *and simultaneously* denied defendants the ability to counter the prosecution's proof of *mens rea* with evidence of mental illness. This

combination of exclusionary rules goes beyond all reasonable Due Process bounds.

## ARGUMENT

### I. ERIC WAS DENIED DUE PROCESS WHEN THE TRIAL COURT REFUSED TO CONSIDER EVIDENCE OF HIS SEVERE MENTAL ILLNESS IN DETERMINING FACTUALLY WHETHER THE PROSECUTION PROVED THE MENTAL ELEMENTS OF THE CRIME CHARGED

#### A. Foreclosing Eric from Refuting the Inferences on Which the Prosecution Relied to Prove the Mental States at Issue Violated His Due Process Right to Contest Guilt at a Fair Trial of the Facts.

The following two subsections of this brief explain why Arizona's prohibition of "diminished capacity" evidence by criminal defendants violates both procedural and substantive Due Process. However, the Court need not reach those issues to decide the present case. Here, the prosecution was permitted to argue to the trier of fact that mental states which were necessary elements of the crime charged against Eric Clark could be inferred *factually* from Eric's behavior; and then Arizona law was applied *to preclude Eric from contending that those factual inferences should not be drawn* because the behavior was explainable, instead, as a manifestation of his chronic paranoid schizophrenia. Such an extension of the Arizona ban plainly denied Eric "'the right to present a defense, [–] the right to present the defendant's version of the facts as well as the prosecution's to the . . . [trier] so it may decide where the truth lies . . . [– which] is a fundamental element of due

process of law.'" *Webb v. Texas*, 409 U.S. 95, 98 (1972), quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967); see, *e.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Goss v. Lopez*, 419 U.S. 565, 579 (1975), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Baldwin v. Hale*, 1 Wall. (68 U.S.) 223, 233 (1863).

The first-degree murder charge against Eric was based exclusively on ARS § 13-1105(A)(3), which defines the crime as the act of causing the death of a law enforcement officer in the line of duty, "[i]ntending or knowing that . . . [one's] conduct will cause death to a law enforcement officer." The prosecution undertook to prove that Eric knew that Officer Moritz was a police officer through several lines of factual inference. One stressed by the prosecutor in his opening and closing arguments was an "ambush" theory – that by driving 22 times around a block in a residential neighborhood before dawn with the truck radio blaring, Eric was "luring" police to the scene so that he could kill an officer who responded to the inevitable calls of disturbed residents.[21] A second line of inference,

[21] *Opening Statement by Prosecuting Attorney Powell*:

"At approximately 4:30 a.m. police dispatch began receiving 9-1-1 calls from the University Heights area. The calls were complaining of a vehicle which was continuously driving around University Heights area with extremely loud music playing. Some people complained that it had been going on for approximately an hour. Some people complained that it had been doing laps. One person who will testify even testified that he counted the vehicle going around in a lap 22 times." (RT 8/5/03 at 15.)

" . . . [H]e lured Officer Moritz to him, by driving around in circles for a minimum of 22 times, and got out of his car, and the ambush was on and Jeff Moritz was killed." (Id.)

(Continued on following page)

asserted by the prosecutor to both strengthen and complement the first line, was that Eric had made statements on occasions prior to the crime indicating that he was angry with police officers and wanted to kill one.[22] Both of these lines of factual inference were cited by the trial judge in support of his finding that Eric was guilty of the crime charged.[23] Both inferences were cited by the Arizona

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*Closing Statement by Prosecuting Attorney Powell*:

> "We know all of the facts of him driving around from sometime [sic] probably before 4:00 a.m. . . . until at least 4:50 when Officer Moritz is killed. We know he's blasting the music. He does the route in that one area of University Heights 22 times. . . . Officer Moritz comes up. . . . We know he exited the vehicle. . . . We know he's ambushed." (RT 8/27/03 at 50/JA 314-15.)

[22] *Opening Statement by Prosecuting Attorney Powell*:

> "And I'd like to leave the Court with one final thought. One – approximately one week before this incident, this murder, the defendant walked up to some individuals at a place called Thorpe Park. . . . The defendant walked up and made some unusual comments to them. You'll hear from two of these individuals this week. His comment was, I think it would be – something to the affect [sic] of, I think it would be cool if I went up on the hill and fired my .22 handgun – and please remember, Officer Moritz was killed with a .22 handgun – fired it into the air until the police came and I would taunt them until they came for me and then as they came for me, I would shoot them in the head with a .22 rifle. That's what he said one week before he lured Officer Moritz to him. . . ." (RT 8/5/03 at 15.)

*Closing Statement by Prosecuting Attorney Powell*:

> "[immediately following the passage quoted in the preceding footnote, about Eric's doing the route "22 times" while "blasting the music"] And it makes me think back to Thorpe Park, Judge, just what he said he was going to do, he was going to taunt the police officer and he was going to kill him with his .22." (RT 8/27/03 at 50/JA 314-15.)

[23] "The Court considered the following evidence:

> "• Defendant's statements at Thorpe Park to Jason Tackett and Mark Fields;

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Court of Appeals in its decision upholding the sufficiency of the evidence to support the conviction.[24]

In the case of a mentally unimpaired person, the inferences urged by the prosecution and drawn by the courts below would be very strong, perhaps compelling. But Eric presented mental-illness evidence that might well have rendered those inferences unpersuasive – and certainly unpersuasive beyond a reasonable doubt – if the trial judge had not viewed himself as bound by *Mott* to decline to consider the evidence for this purpose.

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- Defendant's actions in driving through a residential area early in the morning with loud music to attract law enforcement. . . .
- . . . . . .

From all of this the Court must conclude that, while the Defendant was affected by his mental illness, it did not, pursuant to the requirements of the statute, distort his perception of reality so severely that he did not know his actions were wrong. Accordingly, the Court finds the Defendant guilty of the First Degree Murder of Officer Jeff Mortiz [sic]."

(Special Verdict at 4-5/JA 333-34.)

[24] "Clark maintains that there was insufficient evidence to support his conviction for first degree murder of a police officer. He rests this argument on his claim that the state presented only circumstantial evidence to show that he (1) intentionally or knowingly caused a death and/or (2) that he intended or knew that he was killing a police officer. . . .

"The evidence at trial established that Clark was angry with police officers and fantasized about ways to retaliate or 'show them,' suggesting a motive for his actions. It also showed that, in driving the pickup truck with its radio blaring, Clark had engaged in behavior that would attract law enforcement to the neighborhood. Clark was playing a 'rap CD' at the time that contained 'many antisocial attitudes' and included lyrics expressing violent attitudes toward police officers. . . .

" . . . All of this is sufficient evidence to support the inference that Clark intentionally or knowingly shot Moritz." (JA 341-44.)

The defense psychiatric expert testified that Eric was suffering from paranoid schizophrenia at the time of the crime (RT 8/22/03 at 36-38/JA 29-32); that paranoid schizophrenics experience auditory hallucinations; and that they are known to turn up the volume on radios and TV's in "an attempt to drown out the voices that they are experiencing" (Id. at 39/JA 32.) The prosecution expert also "diagnosed . . . [Eric] to have schizophrenia, paranoid type." (RT 8/26/03 at 38/JA 136; *see also*, e.g., Id. at 35, 89-91, 94, 133, 163-64, 172-74/JA 132-33, 179-82, 184, 219-20, 246-47, 254-57.) He stressed on redirect that no one knows "what was going through the defendant's head at the time of the murder" (Id. at 175/JA 257); and gave the following testimony on cross:

> "Q. We know that he was delusional as he drove around and listened to this loud, pounding music?
>
> A. His delusions were present then, yes.
>
> Q. Yeah. Do you think that was for the purpose of drowning out voices in his head?
>
> A. That's one theory. Well, actually, that was the theory that was – I think his mother expressed about why he kept the television so loud.
>
> Q. And your experience with schizophrenics are, they often turn up TV's loud, radios loud to drown out the voices?

A. I have encountered that." (Id. at 170/JA 253.)[25]

Accordingly, defense counsel argued in closing that "Dr. Morenz, Dr. Moran testified, many schizophrenics use volume to turn [sic] out the voices. . . . Judge, its pretty apparent Eric was doing just that, especially when you look at this overall." (RT 8/27/03 at 23/J.A. 295.) But under the trial judge's view of *Mott*, he could not consider this evidence and argument as a basis for rejecting the prosecution's contention that the intent to ambush Officer Moritz could be inferred from Eric's blaring CD player.

The defense expert also addressed the plausibility of inferring that Eric had the requisite *mens rea* for conviction via the prosecution's proposed "ambush" motive based

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[25] On redirect examination by the prosecutor, the prosecution expert gave this testimony:

"Q. . . . I think at one point you had said you didn't think the circling behavior in the neighborhood of University Heights was prefatory conduct. Do you agree with that today?

A. Yes. I think that I wouldn't agree with that. I think that the theory that has the most support in my mind is that he enticed the cop and so he was provoking a police action. As I have said before, the alternative theory is that he was in a paranoid state and so forth. *We don't know which of these two is true*, but my position is, it's more likely and more probable that he intended to shoot the cop." (Id. at 191/JA 272) (emphasis added).

Of course, had this testimony been considered by the trial judge on the issue of Eric's intent, it would have had to be evaluated under a burden-of-proof rule requiring the prosecution to eliminate any reasonable doubt regarding this choice of "theory," not under the burden-of-proof rule applicable to the issue of insanity under Arizona law – the only issue for which the trial judge considered the mental-illness evidence – a rule requiring that the defendant prove insanity by clear and convincing evidence.

on evidence of Eric's prior statements about taunting and shooting a police officer.

"Q. . . . Do you think based on, again, your training and experience as a psychiatrist, that Eric was in any way trying to – preparing or trying to create an ambush to kill this police officer?

A. I can't imagine that.

Q. Why not?

A. Eric's behaviors were just – there wasn't much purpose or, you know, didn't seem there was much rhyme or reason to his behaviors. You know, he was continually a surprise to his parents. They didn't know what he was going to do next, which is what they were so concerned about and why they wanted him in the hospital, you know, he wasn't functioning in school, you know, he really wasn't functioning at all.

To hypothesize that he was sort of planning, you know, kind of a scheme to lure police I think is a bit of a stretch. I have trouble imagining that. . . ." (RT 8/22/03 at 46-47/JA 37-39.)

"Q. . . . Based on your experience and your review of the evidence, was Eric even at that time [referring to the time of Eric's weeks-old statements which the prosecution urged and the trial judge found supported an "ambush" theory] capable in your mind of planning several weeks in advance what was going to happen?

A. Oh, no." (Id. at 112/JA 95.)

But again the trial judge's view of *Mott*, while allowing him to infer an "ambush" motive (and therefore intent and knowledge) from Eric's prior statements, precluded him from considering whether Eric's mental illness cast a reasonable doubt upon that inference.

A trial of factual issues crucial to the determination of guilt or innocence under a State's criminal law cannot be conducted in such a fashion without violating the first principles of due process. This Court has held time and again that when the prosecution at a criminal trial asks the trier to infer facts on which its case depends, the defendant cannot constitutionally be foreclosed from responding with evidence and argument that *factually* throws the inference into doubt. *Kelly v. South Carolina*, 534 U.S. 246, 248, 252 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Rock v. Arkansas*, 483 U.S. 44, 51-55 (1987); *Crane v. Kentucky*, 476 U.S. 683, 689-91 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 5 n. 1 (1986); *and see, e.g., Ake v. Oklahoma*, 470 U.S. 68, 76, 80, 83-84 (1985); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion); *Wardius v. Oregon*, 412 U.S. 470, 474-76 (1973); *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

The several prevailing opinions in *Simmons v. South Carolina*, 512 U.S. 154 (1994), sufficiently exemplify the principle – although in the context of a capital sentencing trial rather than a guilt trial. There, Justice Blackmun's lead opinion found it elementary that:

> "if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses

> to society. Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." (*Id.* at 168-169.)

Justice Ginsburg explained that when the prosecution makes a factual argument central to its case, "the defendant's right to be heard means that he must be afforded an opportunity to rebut the argument." (*Id.* at 174.) And Justice O'Connor, concurring for herself and Justice Kennedy and Chief Justice Rehnquist, added that "one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him." (*Id.* at 175.)

Any of these axiomatic statements of Due Process law provides a sufficient basis for deciding Eric Clark's case on the present record. To do other than reverse his conviction would set them all at naught.

### B. The *Mott* Rule Prohibiting Consideration of Evidence of Mental Illness on the Issue of *Mens Rea* Unconstitutionally Excludes Probative Exculpatory Evidence. Foreclosing Eric from Demonstrating Factually that He Did Not – Because He Could Not – Possess the Mental States Which Were Elements of the Crime Charged Denied Him the Right to Present a Defense Basic to Procedural Due Process.

Even had the prosecution not affirmatively sought and obtained Eric's conviction on the basis of factual inferences regarding his state of mind, that he was denied the opportunity to refute, the trial court's refusal to consider his

mental-illness evidence as bearing on the statutorily defined mental elements of the crime for which he was on trial violated procedural Due Process. The trial court's refusal to consider Eric's mental-illness evidence as bearing on the statutorily defined mental elements of the crime for which he was on trial violated procedural Due Process because "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, . . . [420 U.S. 284 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, . . . (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), quoting *Trombetta v. California*, 467 U.S. 479, 485 (1984). This right includes the opportunity to contest the existence of any fact that must be found by the trier in order to convict. See, *e.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1987); *Olden v. Kentucky*, 488 U.S. 227 (1988).

Here, the trial court held that under the *Mott* rule it was obliged to *find as a fact that Eric knew he was shooting a police officer to death* – a necessary factual element of the only form of first degree murder charged against Eric – while simultaneously *refusing to consider Eric's evidence that an acute episode of his chronic paranoid schizophrenic illness prevented him from actually having that knowledge*. In this situation, the "question of characterization" that Justice Ginsburg described as dividing the Court in *Montana v. Egelhoff*, 518 U.S. 37, 56-57 (1996), vanishes. The *Mott* rule can only be characterized as "a rule designed to keep out 'relevant exculpatory evidence'"[26]

[26] Petitioner concedes that the right to present exculpatory evidence is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996).

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(*id.* at 57 [Justice Ginsburg quoting Justice O'Connor's dissenting opinion for four Justices *id.* at 67]) and therefore one that "offends due process." (*id.* at 57)

The *Mott* Rule cannot be saved on the theory that it constitutes "a redefinition of the mental-state element of the offense" (*id.*). A majority of this Court could plausibly conclude that the Montana legislature in *Egelhoff* had essentially enacted alternative substantive criminal provisions punishing anyone who either (1) purposely or knowingly kills another person when sober or (2) voluntarily gets so drunk that s/he is capable of killing another person without knowing it. (See, 518 U.S. at 57-58.) However, no one could plausibly attribute to the Arizona legislature an intention to create alternative substantive offenses punishing equally (1) a mentally sound individual who kills an on-duty police officer if (but only if) s/he does so intentionally or knowingly, and (2) a mentally ill person who is involuntarily bereft of the cognitive ability to understand that the death of an on-duty police officer will be the consequence of his or her actions.[27] Plainly, the *Mott* ban on mental-illness evidence is not based on such a

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However, exclusion of exculpatory evidence is unconstitutional where it has "infringed on the weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986). As discussed herein (see Note 18, *supra* and Note 29 *infra* with accompanying text) Arizona has advanced no valid reason for precluding consideration of this type of probative exculpatory evidence.

[27] We will demonstrate in the following subsection that a substantive criminal statute treating these two situations as involving equivalent culpability would be so irrational and historically aberrant as to violate substantive due process.

bizarre substantive equation.[28] If it reflects anything other than the *Mott* majority's mechanistic application of the *expressio-unius/exclusio-alterius* maxim to Arizona's criminal code,[29] it must be grounded on the notion that mental-illness evidence, as a class, is too beguiling or too controversial to permit it to be used in the way that any other sort of evidence of ignorance or mistake could be

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[28] As Justice Souter wrote for four members of the Court in *Schad v. Arizona*, 501 U.S. 624, 643 (1991), "[i]f . . . two mental states are supposed to be equivalent means to satisfy the *mens rea* element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability. . . ."

[29] The *Mott* court's explicit rationale for holding that "expert testimony regarding a defendant's mental capacity is [not] admissible to challenge the requisite mental state of a challenged crime" (187 Ariz. at 544, 931 P.2d at 1054) was (1) that "Arizona's criminal code was based on the Model Penal Code" (187 Ariz. at 540, 931 P.2d at 1050) but did not include § 4.02(1) the provision that "allowed the admission of '[e]vidence that the defendant suffered from a mental disease or defect . . . whenever it [wa]s relevant to prove that the defendant did or did not have a state of mind that is an element of the offense'" (*id.*); (2) that "[t]he legislature's decision not to adopt this section of the Model Penal Code evidences its rejection of the use of psychological testimony to challenge the *mens rea* element of a crime" (*id.*); and (3) that "[b]ecause the legislature has not provided for a diminished capacity defense, we have since consistently refuse to allow psychiatric evidence to negate specific intent" (187 Ariz. at 541, 931 P.2d at 1051). *See also, State v. Schantz*, 98 Ariz. 200, 210-13, 403 P.2d 521 (1965) where the Arizona supreme court indicated that admitting evidence of mental illness to establish a defendant "did not have a state of mind which is an element of the offense" would force the jury into "releasing upon society many dangerous criminals who obviously should be placed under confinement." Under Arizona law, however, a defendant found GEI is committed to a secured mental health facility for the presumptive term (25 years in this case). *See*, ARS § 13-502(D); *State v. Ovind*, 186 Ariz. 475, 924 P.2d 479 (App. 1996). Moreover, consideration of such evidence might equally lead to a verdict of guilty of a less serious form of homicide with its attendant mandatory prison term. *See*, ARS §§ 13-1102 to 1104. Although the Arizona supreme court agreed that Model Penal Code § 4.02(1) was "desirable" it refused to adopt it "piecemeal." 98 Ariz. at 213.

used, to "negate[] the culpable mental state required for commission of . . . [an] offense."[30] That supposed justification for the rule brings it squarely into conflict with this Court's procedural Due Process holdings in *Chambers* and *Rock*.

*Fisher v. United States*, 328 U.S. 463 (1946), does not suggest otherwise. The sole issue considered by the *Fisher* majority was whether Fisher's trial judge was obliged to charge the jury affirmatively on Fisher's theory of the case, which was that his mental impairments negated the premeditation requisite for a first-degree murder conviction. The majority held that such affirmative instructions could be refused without offending the Constitution or exceeding the discretion allowed to the courts of the District of Columbia because Fisher's jury *was* instructed on premeditation in terms that permitted it to consider his evidence of intellectual and emotional deficiencies as bearing on that issue.[31] It was *not* forbidden to take those deficiencies into account in determining whether the prosecution had proved premeditation beyond a reasonable doubt. As the *Fisher* majority viewed the record, Julius Fisher in 1944 got exactly the consideration of his mental-illness evidence which Eric Clark is seeking in the

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[30] *See* ARS § 13-204(A): "Ignorance or a mistaken belief as to a matter of fact does not relieve a person of criminal liability unless: [¶] 1. It negates the culpable mental state required for commission of the offense. . . ."

[31] The jury in *Fisher* was instructed:

> "It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if not guilty by reasons of insanity, the defendant at most is guilty only of second degree murder or manslaughter, accord as you may find he acted with or without malice." 328 U.S. at 467, n. 3.

present case and which was denied below by the judge's application of the *Mott* exclusionary rule.

### C. If Arizona's Evidentiary Prohibition is Considered Substantive, Foreclosing Eric From Proving that Mental Illness Made Him Incapable of Forming the Subjective *Mens Rea* Elements of First-Degree Murder Denied Him Substantive Due Process.

Straining to characterize the trial judge's application of *Mott* in Eric's case as a substantive "redefinition of the mental-state element of the offense" would change the constitutional analysis but would not produce a different result. The Court justifiably gives great deference to state legislative judgment in defining crimes and their elements when challenged as violations of substantive Due Process. *E.g.*, *Patterson v. New York*, 432 U.S. 197, 201-02 (1977); *Powell v. Texas*, 392 U.S. 514 (1968). But as it has recently observed in another context, deference does not by definition preclude relief.[32]

The Due Process Clause imposes vital although tolerant limits upon a State's power to inflict severe criminal sanctions in disregard of the fundamental Anglo-American principle that crime is "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 251 (1952). When that principle is so blatantly affronted as to offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as

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[32] *Miller-El v. Dretke*, 125 S. Ct. 2317, 2325 (2005), quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

fundamental" (*Snyder v. Massachusetts*, 297 U.S. 91, 105 (1934)), the limits have been exceeded. *E.g.*, *Lambert v. California*, 355 U.S. 255 (1957); *Robinson v. California*, 370 U.S. 661 (1962).

It goes beyond these limits to make *Mott* into a rule punishing with equal and extreme severity two individuals – one, but only if when killing a police officer s/he knew the officer's identity and intended the officer's death; the other, because, in killing a police officer, s/he was suffering a mental derangement which occluded that knowledge and excluded that intent. It is one thing for a State to equate voluntary intoxication with the usual *mens rea* elements of a crime when an intoxicated person commits the *actus* as in *Montana v. Egelhoff*. That is consistent with a view deeply rooted in Anglo-American history that a person who kills or harms another through ignorance brought on "when he was drunk . . . [and] had no understanding and memory" shall "not be privileged thereby" because the "ignorance was occasioned by his own act and folly, and he might have avoided it."[33] But no such fault is involved in Eric Clark's affliction with chronic paranoid schizophrenia, nor "might [he] have avoided" the ignorance of Officer Moritz's identity that resulted from his involuntary medical condition.

It does not comport with the historical traditions that defined the fundamental principles of justice known to the

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[33] *Reniger v. Feogossa*, 1 Plow. 1, 19, 75 Eng. Rep. 1, 31 (Exch. Ch. 1551); and see, *e.g.*, 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 32 (1800 ed.); 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 165 (1883 ed.) ("The reason why ordinary drunkenness is no excuse for crime is that the offender did wrong in getting drunk. . . .").

Framers of the Due Process Clause to equate insanity with the culpable mental states demanded of a sane person charged with first-degree murder. To the contrary, evidence of insanity had long been received to *negate* the *mens rea* elements of crimes. "Until the nineteenth century, criminal law doctrines of *mens rea* handled the entire problem of the insanity defense. Evidence of mental illness was admitted on the question of intent, and, as the infant discipline of psychiatry claimed an increased understanding of mental processes, such evidence grew in importance." Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 500 (1982).[34] The notion arose early in English criminal jurisprudence that culpability depended upon intention conjoined with action[35]; and this principle was linked from the outset with the recognition that insane persons should not be criminally punished because they lacked culpable intent. Bracton's thirteenth-century treatise *On the Laws and Customs of England* reflects the basis for this principle:

> " . . . [F]or a crime is not committed unless the will to harm be present. Misdeeds are distinguished by both will and by intention [and theft

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[34] *See also id.* at 501: "The pre-nineteenth century position was correct and clear: the psychiatrist could contribute useful evidentiary insights to the issues correctly defined by the common law of crime; that is, did the accused intend the prohibited harm?"

[35] The *mens rea* concept dates at least as far back as Plato's attempts to construct an ideal criminal code. Plato rejected the then prevailing view that differentiated crimes based upon whether they were voluntary or involuntary and proposed a gradation of crimes based upon levels of intent. Plato set forth a criminal code much like that of modern jurisprudence that permitted defenses based upon insanity and other forms of incapacity because they negated intent. A.E. Taylor, INTRODUCTION, IN THE LAWS OF PLATO XLIX-1, 253-73 (trans. 1934).

> is not committed without the thought of thieving]. And then there is what can be said about the child and the madman, for the one is protected by his innocence of design, the other by the misfortune of his deed. In misdeeds we look to the will and not the outcome. . . ."

(Translated and quoted in 1 NIGEL WALKER, CRIME AND INSANITY IN ENGLAND [THE HISTORICAL PERSPECTIVE] 26 (1968).[36]

Coke gave the concept classic expression in his dictum that "in criminal causes, as felonies, etc., the act and wrong of a madman shall not be imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*." 2 Coke on Littleton, 247b, quoted in Sheldon Glueck, MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE 130 (1927). Although later commentators were to become preoccupied with developing and refining "arbitrary tests of irresponsibility, which are only concerned with *one element* or *one example* of the required total guilty intent" (*id.* at 131) – an enterprise that led to the distinct legal *doctrine* of insanity and thence to the *M'Naghten* formulation of that doctrine[37] – Coke

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[36] The bracketed phrase may be a later interpolation into Bracton's text. Walker makes the observation that Bracton, unlike his Roman-law sources, does not seem to be justifying leniency for the insane on the ground that madness is punishment enough, but rather is expounding the principle that "intention is all-important when it is a question of crime" (*id.* at 26) and "it is clear that for Bracton madmen as well as children were examples of offenders who lacked the intention necessary for guilt" (*id.* at 27).

[37] See 1 WALKER, *supra*, at 52-103. After the insanity doctrine took shape as a distinct defense with its own defining rules, defense lawyers appear to have less frequently proffered mental-health evidence as the basis for a reasonable doubt that their clients had entertained the *mens*

(Continued on following page)

himself reasoned from the basic premises of "the requirement of a 'guilty intent' as the basis of every crime and the fact that disease or defect of mind *negatives such intent.*" (*id.*) He "recognized the necessity of a guilty mind as the basis of every crime, and agreed with Bracton that an insane person can have no criminal intent." (*id.*).[38] This aspect of Coke's thinking "greatly influenced the law of his own day and later days."[39]

Justice Jackson described the transmission of this tradition from seventeenth and eighteenth century English

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*rea* elements of specific offenses. Two knowledgeable authorities on the subject have surmised that "[t]he most probable reason would seem to be that they have been distracted by the 'tests' of insanity, which purport to be comprehensive and to cover the subject." Henry Weihofen & Winfred Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L. J. 959, 964 (1947). In the late nineteenth century and the twentieth, increasing recourse to such evidence by defense attorneys produced a mixed reaction from the courts, some of which now reasoned that legislative codification of the special plea of "not guilty by reason of insanity" had preempted the field. See *id.* at 965-68; Edwin R. Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. PA. L. REV. 267, 272-77 (1950); Travis D. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975).

[38] See also John Biggs, Jr., THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE 82-87 (1955); Henry Weihofen, MENTAL DISORDER AS A CRIMINAL DEFENSE 53-54 (1954); Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CALIF. L. REV. 105, 110 (1923); Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 538-40 (1917).

[39] Biggs, *supra* note 38, at 86. As the Court has noted, Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York*, 445 U.S. 573, 594 & n. 36 (1980), quoting A.E. Dick Howard, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 118-19 (1968).

jurisprudence to the colonies and then the States in *Morissette v. United States*, 342 U.S. 246, 252 (1952):

> "As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that . . . intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes."

Arizona acted in this tradition when, in making some killings of police officers first-degree murders, it insisted that those murders be distinguished from murders of the second degree by a finding that the killer actually knew s/he was taking a police officer's life and intended that result. But the Arizona courts in Eric's case broke radically with the tradition when they held that he could be punished as though he had this knowledge and intent although

he may not in fact have had either. It amounts to punishing a paranoid schizophrenic for his actions committed under circumstances where a mentally unimpaired person would *not* be punished with the same severity. Such a redefinition of the mental-state element of first degree murder in the case of mentally ill individuals arbitrarily "lays an unequal hand on those who have committed intrinsically the same quality of offense" and outrages even "that large deference" which the Fourteenth Amendment owes to state substantive criminal-law experimentation. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

## II. ARIZONA'S LAW OF CRIMINAL RESPONSIBILITY DEPARTS DRASTICALLY FROM THE DEEPLY ROOTED, FUNDAMENTALLY IMPORTANT, AND STILL PREVALENT STANDARD, REFLECTED BY *M'NAGHTEN* AND VIOLATES DUE PROCESS

Prior to 1993, Arizona's substantive test of exemption from criminal liability was whether "at the time of the criminal act, . . . [the accused] had '(1) [s]uch a defect of reason as not to know the nature and quality of the act, or (2) [i]f he did know [the nature and quality of the act], that he did not know he was doing what was wrong.'" *State v. Tamplin*, 195 Ariz. 246, 248, 986 P.2d 914, 916 (Ariz. Ct. App. 1999.) This two-part definition of insanity is deeply rooted in Anglo-American law. It is generally associated with the pronouncement of the English House of Lords in *M'Naghten's Case*, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843), though its origins long predate *M'Naghten*.

In 1993, the Arizona Legislature cut back this *M'Naghten* Rule by half. It enacted the current ARS § 13-502(A), under

which a person may be found "guilty except insane" only "if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." As the Arizona Court of Appeals has recognized, "[t]he new statute essentially abandoned the first prong of the *M'Naghten* test." *Tamplin*, 195 Ariz. at 248, 986 P.2d at 916. That is, in Arizona a defendant who establishes that the mental disease or defect from which s/he suffers is so severe that it prevented her/him from knowing the nature and quality of his or her actions is now ineligible for the insanity defense.

### A. The Arizona Statute Is Contrary to the Most Deeply Rooted Historical Standard for Insanity.

It is axiomatic that the Due Process Clause of the Fourteenth Amendment prohibits States from altering their criminal laws in ways that "offend . . . [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977), quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958), and citing *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, 518 U.S. at 43; *accord*: *Medina v. California*, 505 U.S. 437, 446 (1992). The statutory change at issue here – Arizona's halving the *M'Naghten* standard for insanity – breaks radically with historical practices that have "deep roots in our common-law heritage" (*id.*, quoted in *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996)) and was virtually

unanimously followed at the time the Fifth and Fourteenth Amendment Due Process Clauses were adopted.

The insanity defense "has its roots in ancient Judaic, Christian and Roman Law." *Neely v. Newton*, 149 F.3d 1074, 1079 (10th Cir. 1998). Scholars of the subject have noted that recognition of the need to treat mentally ill persons differently in the context of criminal punishment is over 2,500 years old:

> "As early as the sixth century B.C., commentary on the Hebrew scriptures distinguished between the harmful acts traceable to fault and those that occur without fault. To those ancient scholars, the paradigm of the latter type of act was one committed by a child, who was seen as incapable of weighing the moral implications of personal behavior, even when willful; retarded and insane persons were likened to children."

AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 324 (1989). See also, Anthony Platt & Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 335, 366 (1965). Beyond that, the more specific conviction that "the insane should not be punished for otherwise criminal acts has been firmly entrenched in the law for at least one thousand years." Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 10 (1982). Without doubt, the exculpatory force of insanity was "firmly established by the time the United States Constitution was adopted, and . . . has remained a fundamental part of American criminal law since Revolutionary days." Rudolph Joseph Gerber, THE INSANITY DEFENSE 83 (1984).

In England, the earliest articulations of insanity embraced the failure to know or understand one's actions. In 1603, for example, Lord Coke approved a definition, dating from Bracton in the thirteenth century that focused on whether the person knew the nature of his or her actions: "A madman is *one who does not know what he is doing*, who lacks in mind and reason and is not far removed from brutes." *Beverley's Case*, 76 Eng. Rep. 1118, 1121 (1603) (emphasis added). By the eighteenth century, English authorities took it to be a first principle that: "[t]he Guilt of offending against any Law whatsoever, necessarily supposing a willful disobedience, can never justly be imputed to those, who are either uncapable of understanding it, or of conforming themselves to it." 1 SERGEANT WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 1 (5th ed. 1771); *see also*, *Rex v. Arnold*, 16 How. St. Tr. 695, 764 (1724) (the jury was instructed that in order to find the defendant insane, it must conclude that he is "totally deprive[d] of his understanding and memory, and *doth not know what he is doing*, no more than an infant, than a brute, or a wild beast") (emphasis added).

In short, from the very earliest periods, the prevailing English conception of insanity has included precisely what Arizona would now rule out: a failure to know the nature of one's actions. Although some features of the insanity defense have changed over time, "the essence of the defense, however formulated has been that *a defendant must have the mental capacity to know the nature of his act* and that it was wrong." *State v. Herrera*, 895 P.3d 359, 372 (Utah 1995) (Stewart, J., dissenting) (emphasis added). Knowledge of the nature of one's actions continued to be a

core ingredient of the concept of insanity when that already ancient concept found expression in its most famous and influential English formulation: the 1843 rule announced by the House of Lords in *M'Naghten's Case*. Under the *M'Naghten* Rule,

> "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843). As courts in this country have long recognized, the *M'Naghten* Rule "was in substance the test of legal insanity as it was known to the common law of England." *State v. Schantz*, 403 P.2d 521, 531-34 (Ariz. 1965); *see United States v. McBroom*, 124 F.3d 533, 544 (3d Cir. 1997) (tracing the *M'Naghten* Rule to "the modern dawn of common law recognition of insanity as a defense to criminal charges"); *United States v. Garcia*, 94 F.3d 57, 61 n. 3 (2d Cir. 1996) ("The earliest formulation of the insanity defense had its origins in *M'Naghten's* case.").[40]

The *M'Naghten* Rule crossed the Atlantic with the common law of England. It rapidly became the basis for

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[40] Courts occasionally refer colloquially to the *M'Naghten* Rule as the "right-wrong test." In context, however, it is clear that this shorthand refers to the entire *M'Naghten* Rule as originally articulated, not just the second part regarding knowledge of the wrongness of the act. *See Garcia*, 94 F.3d at 61 n. 3 (quoting the *M'Naghten* Rule in its entirety and then referring to it as "the right-wrong test").

the test of insanity in every U.S. jurisdiction except New Hampshire. See Weihofen, *supra* note 38, at 68-69. During the succeeding decades some jurisdictions supplemented *M'Naghten* with more lenient standards such as the "irresistible impulse" test, but *M'Naghten* continued to describe the essential minimum standard for the vast majority of jurisdictions. Thus, by drastically narrowing its definition of insanity to exclude defendants who did not know the nature and quality of their actions at the time of the offense charged, Arizona has departed from the canonical standard of insanity – a standard that was well established and accepted at the time the Due Process Clauses were conceived, written, and ratified.

### B. The Vast Majority of States Continue to Employ a Standard at Least as Broad as the *M'Naghten* Rule.

Not only is the *M'Naghten* Rule deeply rooted in our history and experience, it remains the most common standard for insanity among the States today. Many other States employ standards that are even more broadly exculpatory than *M'Naghten*. Through one or the other of these practices, the overwhelming majority of American jurisdictions continue to accommodate the deeply rooted conception of insanity reflected in the *M'Naghten* test.

Twenty States, as well as the federal government, retain the *M'Naghten* Rule in its original form or with slight modifications that preserve the key provision at issue here.[41] An additional seventeen States plus the

[41] See Ala. Code § 13A-3-1; Alaska Stat. § 12.47.010; Cal. Penal Code § 25; Fla. Stat. Ann. § 775.027; Iowa Code Ann. § 701.4; Minn.

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District of Columbia have adopted some version of the standard proposed by the American Law Institute ("ALI"), which is broader than and subsumes the *M'Naghten* Rule.[42] The ALI standard provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." Model Penal Code § 4.01 (P.O.D. 1962). Some ALI jurisdictions have not retained the volitional component of the test (*i.e.*, the language regarding "conform[ing] his conduct to the requirements of the law"), but most have kept it. All ALI jurisdictions retain the cognitive component referring to a person's lack of "substantial capacity to appreciate the criminality of his conduct." That part of the ALI test alone expands on the *M'Naghten* Rule (by requiring appreciation rather than mere knowledge) while retaining a central concern not just for whether the defendant could tell right from wrong, but

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Stat. Ann. § 611.026; *Roundtree v. State*, 568 So.2d 1173 (Miss. 1990); Mo. Ann. Stat. § 552.030; *State v. Hurst*, 594 N.W.2d 303 (Neb. Ct. App. 1999); *Finger v. State*, 27 P.3d 66 (Nev. 2001); N.J. Stat. Ann. § 2C:4-1; *State v. White*, 270 P.2d 727 (N.M. 1954); N.Y. Penal Law § 40.15; *State v. Staten*, 616 S.E.2d 650 (N.C. Ct. App. 2005); N.D. Cent. Code § 12.1-04.1-01; Okla Stat. tit. 21, § 152(4); 18 Pa. Cons. Stat. § 315(b); Tenn. Code Ann. § 39-11-501; *Bennett v. Commonwealth*, 511 S.E.2d 439 (Va. Ct. App. 1999); Wash. Rev. Code Ann. § 9A.12.010; 18 U.S.C. § 17.

[42] See Ark. Code Ann. § 5-2-312; Conn. Gen. Stat. Ann. § 53a-13; *Bethea v. United States*, 365 A.2d 64 (D.C. 1976); Haw. Rev. Stat. Ann. § 704-400; 720 Ill. Comp. Stat. Ann. 5/6-2(a); Ind. Code Ann. § 35-41-3-6(a); Ky. Rev. Stat. Ann. § 504.020(1); Me. Rev. Stat. Ann. tit. 17-A, § 39; Md. Code Ann., Crim. Proc. § 3-109; *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967); Mich. Comp. Laws Ann. § 768.21a(1); Or. Rev. Stat. § 161.295; *State v. Johnson*, 399 A.2d 469 (R.I. 1979); Vt. Stat. Ann. tit. 13, 4801; *State v. Grimm*, 195 S.E.2d 637 (W.V. 1973); Wis. Stat. Ann. § 971.15; Wyo. Stat. Ann. § 7-11-305(b).

whether s/he understood the import of his or her actions. See, Rita J. Simon & David E. Aaronson, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 39 (1988) (noting that "the ALI test further expanded the *M'Naghten* rule by requiring *a failure to apprehend the significance of one's actions* in some deeper sense involving 'affect' or 'emotional appreciation,' rather than some surface understanding or verbalization of knowledge") (emphasis added). One final State, New Hampshire, employs the product test, under which the defendant is not guilty by reason of insanity if his or her crime "was the offspring or product of mental disease." *State v. Pike*, 49 N.H. 399, 408 (1869). This test, too, subsumes *M'Naghten* within it. *See Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954) (calling the product test a "broader test" than *M'Naghten*).

All together, at least thirty-eight States, the District of Columbia, and the federal government employ insanity standards under which those satisfying either part of the *M'Naghten* Rule qualify as legally insane. This pervasive practice confirms the fundamental place that the *M'Naghten* Rule continues to occupy in American criminal law, and further compels the conclusion that States may not go below the *M'Naghten* standard without violating Due Process. See *Cooper*, 517 U.S. at 359-62.

### C. Ample Precedent Supports the Conclusion that States May Not Adopt an Insanity Test Narrower than *M'Naghten's* Without Violating Due Process.

Although this Court has never squarely addressed the issue,[43] a number of lower courts have held that Due Process prohibits States from cutting back on the *M'Naghten* Rule. In *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910), the Washington Supreme Court held that a state statute abolishing the *M'Naghten* Rule violated the Washington Constitution.[44] In so concluding, the court surveyed the law of insanity more broadly, noting the historic "'rule of law in every civilized country that no insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime.'" 60 Wash. at 114, 110 P. at 1022. Relying, in part on legal authorities interpreting the United States Constitution, and using the precise sort of historically sensitive analysis that this Court has employed when resolving Due Process issues, the *Strasburg* Court held that abolishing the *M'Naghten* Rule violated Due Process. See *id.*

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[43] The Court has, however, embraced *M'Naghten* as the appropriate "test to be applied to the general defense of insanity." *Hotema v. United States*, 186 U.S. 413, 420 (1902) (describing the test as whether the "defendant knew the nature and quality of his act when he committed it, and that it was wrong and a violation of the law of the land, for which he would be punished"). *See also, Davis v. United States*, 186 U.S. 373, 378 (1897) (defining an insane person as being "incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing.")

[44] The statute provided that "[i]t shall be no defense to a person charged with the commission of a crime that at the time of its commission he was unable, by reason of his insanity, idiocy or imbecility, to comprehend the motive and quality of the act committed, or to understand that it was wrong." 110 P. at 1021.

The Mississippi Supreme Court reached a similar conclusion in *Sinclair v. State*, 161 Miss. 142, 132 So. 581, 582 (1931) when it struck down on state due process grounds a statute that provided that "the insanity of the defendant at the time of the commission of the crime shall not be a defense against indictments for murder." In a concurring opinion, Justice Ethridge stressed that "it is certainly shocking and inhuman to punish a person for an act *when he does not have the capacity to know the act* or to judge of its consequences." *Id.* at 584 (emphasis added).

More recently, in *Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001), the Nevada Supreme Court, after exhaustively tracing the history of the insanity defense in American law, held that "legal insanity is a well-established and fundamental principle of the law of the United States," and "is therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions." 117 Nev. at 575, 27 P.3d at 84. The insanity standard to which the court referred was the *M'Naghten* Rule. 117 Nev. at 576-578, 27 P.3d at 84-86.

Put simply, the *M'Naghten* Rule is a fundamental principle of law, and the Constitution secures for eligible defendants the right to put on an insanity defense under a standard at least as broad as *M'Naghten*. Other courts agree. *United States v. Greene*, 489 F.2d 1145, 1172 n. 69 (D.C. Cir. 1974) (noting that "the insanity defense . . . appears to be constitutionally required"); *Ingles v. People*, 92 Colo. 518, 522, 22 P.2d 1109, 1111 (Colo. 1933) ("[A] statute providing that insanity shall be no defense to a criminal charge would be unconstitutional.").

This Court's precedents are not to the contrary. There are two key points to note about its cases in this area.

First, the issue in most of the cases was the constitutionality of the burden of proof used to adjudicate the insanity defense, rather than anything to do with the substantive contours of the defense.[45] Second, in cases that do refer to the appropriate substantive standard for insanity, the question is invariably whether the Constitution should be construed to require a *broader* definition of insanity than the one established by *M'Naghten*. That is, the cases involved arguments that the *M'Naghten* Rule is constitutionally *insufficient*, not, as here, the more modest claim that *M'Naghten* ought to be preserved as a constitutional minimum.[46]

In *Leland v. Oregon*, 343 U.S. 790 (1952), for example, the Court devoted the bulk of its attention to a claim that Oregon had violated Due Process by placing upon the defendant the burden of proving insanity beyond a reasonable doubt. *Id.* at 799. It then disposed of the defendant's contention that the Constitution compelled adoption of the more permissive "irresistible impulse" test for insanity, rather than Oregon's *M'Naghten* Rule.

---

[45] *E.g.*, *Rivera v. Delaware*, 429 U.S. 877 (1976). Analogously, in *Patterson v. New York*, 432 U.S. 197 (1977), the Court held that Due Process was not offended by a New York law that placed the burden of proving the affirmative defense of extreme emotional disturbance upon the defendant. In that context the Court stated that "it is normally within the power of the State to regulate *procedures* under which its laws are carried out, including the burden of producing evidence and the burden of persuasion." *Id.* at 201 (emphasis added). *Accord*, *Martin v. Ohio*, 480 U.S. 228, 231-32 (1987).

[46] To reject the former sort of claim is a far cry from rejecting the latter. As Justice Scalia has written, the purpose of the Due Process Clause "is to prevent future generations from lightly casting aside important traditional values – not to enable this Court to invent new ones." *Michael H. v. Gerald D.*, 391 U.S. 110, 122 n. 2 (1989).

> "The science of psychiatry has made tremendous strides since . . . [the] test was laid down in *M'Naghten's Case*, but the progress of science has not reached a point where its learning would compel us to require the states to *eliminate* the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.'" (emphasis added.)

*Id.* at 800-01 (footnotes omitted). The Court thus concluded that, in light of the scientific and policy disagreements over the relative merits of the *M'Naghten* and irresistible impulse tests, it would be inappropriate to require the States to adopt a volitional add-on to the time-honored *M'Naghten* Rule as a matter of constitutional law. But that conclusion did not imply that there are no constitutional limits to the States' power to erode the traditional boundaries between the spheres of culpability and madness, or that *M'Naghten* does not stand as a bastion of those boundaries. If anything, the Court's respect for *M'Naghten* implicitly suggested its fundamental character.

Similarly in *Powell v. Texas*, 392 U.S. 514 (1968), the Court considered the constitutionality of a statute making it a crime to be intoxicated in a public place. Powell attacked the statute under *Robinson v. California*, 370 U.S. 660 (1962), which had struck down a California law making it criminal to have a drug addiction. He argued that the Texas statute effectively created a similar status

crime because "chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts." *Powell*, 392 U.S. at 535. At bottom, this amounted to an argument that, as a matter of irrefutable fact, "chronic alcoholics suffer from an irresistible impulse to drink and [that they] are therefore insane" as a matter of federal constitutional law. Robitscher & Haynes, *supra*, at 58. *See Powell*, 392 U.S. at 544 (Justice Black, concurring) noting that, were the Court to accept Powell's argument, it "would be . . . require[d] [to] recogni[ze] . . . 'irresistible impulse' as a complete defense to any crime," even though that was "probably contrary to present law in most American jurisdictions"). It was in that context that the Court declined the invitation to "defin[e] . . . some sort of insanity test in constitutional terms" (*id.* at 536) as an exercise that would have offended "[t]raditional common-law concepts of personal accountability" (*id.* at 536) – "casting aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds" (*id.* at 535-36) – as well as overriding "essential considerations of federalism" (*id.* at 535). So *Powell*, like *Leland* is far from categorically rejecting the idea of a minimum constitutional standard for insanity, particularly one that is firmly *grounded in* those very common-law traditions.[47]

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[47] Similarly, *Medina v. California*, 505 U.S. 437 (1992), cannot be understood as speaking to the issue. In *Medina* the Court found that Due Process was not offended by a State's imposing on criminal defendants the burden of proving (by a preponderance of the evidence) their incompetence to stand trial. The ruling was explicitly predicated

(Continued on following page)

In sum, although this Court has not yet addressed the question whether the States can constitutionally abrogate the insanity defense or confine it to a compass narrower than the traditional *M'Naghten* Rule,[48] the historicity and continuing pervasiveness of the core elements of *M'Naghten* bear all of the conventional indicia of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Patterson*, 432 U.S. at 201-02. And one of those core elements is the immemorial principle that an individual cannot be held culpable for acts when s/he does not even know what s/he is doing. In flouting that principle, Arizona violates Due Process.

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on a finding that "there is no settled [historical] tradition on the proper allocation of the burden of proof in a proceeding to determine competence." *Id.* at 446. In declining to create a constitutional burden-of-proof rule with no foundation in tradition, the Court noted in passing that "we have not said that the Constitution requires the States to recognize the insanity defense." *Id.* at 449 (citing *Powell*, 329 U.S. at 536-37). That entirely accurate statement carefully avoids deciding the issue which it describes as undecided.

[48] The Supreme Courts of Idaho, Montana and Utah have concluded that the Constitution permits States to abolish the insanity defense. *See, e.g., State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990); *State v. Korell*, 213 Mont. 316, 690 P.2d 992 (Mont. 1984). Each of those decisions incorrectly seeks support for that conclusion in this Court's precedents which we have discussed above and shown to leave the issue open. And the lower-court decisions themselves sustain the abolition of the traditional insanity defense – the distinct *legal* doctrine exempting a defendant from criminal liability on the ground of a qualifying mental illness – only when the defendant's right to show his or her mental illness as a *factual* basis for contesting the prosecution's proof of the *mens rea* elements of the charged offenses is preserved. That is, of course, not the case in Arizona. See Point I *supra* and Point III *infra*.

### D. The Suggestion of the Court of Appeals that Arizona's Halving of the *M'Naghten* Standard Made No Difference in Eric's Case Disregards the Record.

After explaining as a matter of legal analysis why Arizona's "eliminating the first prong of the *M'Naghten* test . . . [does not constitute] a violation of due process," the Court of Appeals below added that the cutback was of no consequence to Eric because "[i]t is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong'." (JA 350) This reasoning starts from the fallacious premise that the line of thinking of a schizophrenic can be predicted by normal logic.

The record flatly refutes that premise. The defense psychiatric expert testified that schizophrenia is "characterized by a variety of forms of distorted thinking . . . , a disturbance in logic; their thinking really does not make a lot of sense. It's not connected." (RT 8/22/03 at 21/JA 18.) "It's not based on logic, it's not based on the shared understanding we have of the world. It's their own idiosyncratic logic." (Id. at 27/JA 22-23; see also id. at 22, 28 JA 18-19, 23-24.) The prosecution expert did not contest this but agreed that paranoid schizophrenia is characterized by distorted thinking and contradictory logic. (RT 8/26/03 at 91, 96-97/JA 181-82, 185-86.) This record contains both expert testimony that Eric "really had a tremendous amount of difficulty perceiving reality as you and I see it" (RT 8/22/03 at 48/JA 39), and descriptions of episodes in which, after engaging in bizarre or violent behavior, Eric appeared immediately afterwards to not know what he had just done or at times know whether it was wrong. (RT 8/19/03 at 99; RT 8/20/03 at 135; RT 8/12/03 at 49-53; RT 8/21/03 at 72-73).

That unawareness of the nature of his acts could coexist in Eric's psychotic mind with knowledge of the wrongness of killing is no less plausible than other insane contradictions he unquestionably harbored. For example as the prosecutor elicited on cross examination of the defense expert psychiatrist:

> "Q. He also told you that his family . . . were his best friends?
>
> A. Yes.
>
> Q. He also told you his parents may be aliens?
>
> A. Yes.
>
> Q. But, in spite of that, they were still his best friends?
>
> A. That kind of conflictual sort of logic is . . . very common with schizophrenics, you know, where two seemingly opposing . . . opposite sorts of things can . . . be present in the person's mind but it's part of their whole irrationality."

(RT 8/22/03 at 73/JA 60-61.)

## III. ASSUMING DUE PROCESS PERMITS A STATE *EITHER* TO HALVE THE INSANITY DEFENSE *OR* TO ABROGATE AN INSANE DEFENDANT'S *MENS REA* DEFENSE, ARIZONA VIOLATED THE CONSTITUTION WHEN IT DID *BOTH*

In prosecuting Eric Clark, Arizona simultaneously denied him the benefit of half of the traditional Anglo-American standard for insanity (Part II, *supra*) and precluded the trier's consideration of Eric's severe mental illness as a basis for factual doubt that the prosecution

had proved the mental elements of the charge of first degree murder. (Part I, *supra*.) This kind of hamstringing of both legs of a mentally impaired defendant's traditional means for obtaining consideration of his/her involuntary mental impairments is exceedingly rare among American jurisdictions. Only four States other than Arizona – Delaware, Georgia, Louisiana, and Ohio – both rule out the first prong of the *M'Naghten* insanity defense and prohibit the use of mental-illness evidence to challenge the prosecution's proof of *mens rea*.[49] Every other State in the Union, as well as the District of Columbia and the federal government, allows a mentally ill criminal defendant at least one, if not both, of these procedures for defending against the imputation of guilt for actions committed without knowing what s/he was doing.

Even those courts that would grant the States the greatest leeway to alter the traditional insanity defense acknowledge that abridging both insanity and the right to present psychiatric evidence to rebut the prosecution's proof of *mens rea* elements would raise serious constitutional difficulties. In upholding the total abolition of the

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[49] Del. Code Ann. tit. 11, § 401(a) and *Bates v. State*, 386 A.2d 1139, 1144 (Del. 1978) (Delaware also, however, permits a finding of GEI for defendants who as a result of a psychiatric disorder have "insufficient willpower to choose whether [to] do the act or refrain from doing it." (§ 401(b)); Ga. Code Ann. § 16-3-2 and *State v. Ball*, 310 S.E.2d 516 (Ga. 1984) (Georgia also, however, provides for the defense of delusional compulsion and permits a finding of GEI if a defendant, as a result of mental illness has "significantly impair[ed] judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." Ga. Code Ann. § 16-3-3; § 17-7-131(a)(2), (c)(2)); La. Rev. Stat. Ann. § 14:14 and *State v. Jones*, 359 So.2d 95, 98 (La. 1978); Ohio Rev. Code Ann. § 2901.01(A)(14) and *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (Ohio 1982).

insanity defense in Idaho,[50] the Idaho Supreme Court noted that "[t]hree states, Idaho, Montana, and Utah, have legislatively chosen to reject mental condition as a separate specific defense to a criminal charge. The statutes in these three states, however, expressly permit evidence of mental illness or disability to be presented at trial, not in support of an independent insanity defense, but rather in order to permit the accused to rebut the state's evidence offered to prove that the defendant had the requisite criminal intent or *mens rea* required . . . to commit the crime charged." *State v. Searcy*, 118 Idaho 632, 635, 798 P.2d 914, 917 (1990). The Utah high court took care to note the same point and to explain the role that mental-illness evidence can still play in trials of criminal guilt or innocence. See *State v. Herrera*, 895 P.2d 359, 364 (Utah 1995).

In Arizona, that role has been foreclosed for defendants whose mental illness prevented them from knowing what they were doing. Beyond the grave constitutional flaws in Arizona's preclusion of defense evidence offered to contest *mens rea* on the one hand and severe curtailment of the *M'Naghten* Rule on the other, the application of both these impediments together deny a criminal accused "a meaningful opportunity to present a complete defense" (*Crane*, 476 U.S. at 690) and make an aimless mockery of the Due Process model of a fair trial

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[50] erroneously, in our view.

## CONCLUSION

Eric Clark's conviction was obtained in violation of Due Process and should be reversed.

RESPECTFULLY SUBMITTED this 30th day of January, 2006.

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Supreme Court, U.S.
FILED
MAR 6 - 2006
OFFICE OF THE CLERK

No. 05-5966

# In The Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner,*

vs.

STATE OF ARIZONA,

*Respondent.*

**On Writ Of Certiorari To The Arizona Court Of Appeals Division One**

## RESPONDENT'S BRIEF ON THE MERITS

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## QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourteenth Amendment's Due Process Clause require a State to enact the complete *M'Naghten* Rule as the test for insanity, when no fundamental principle of justice requires a State to enact an insanity defense or any particular definition of insanity?

2. Does the Fourteenth Amendment's Due Process Clause prohibit a State from defining mens rea without regard to mental disease or defect, when no fundamental principle of justice requires a State to account for mental disease or defect in any particular way?

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## OPINION BELOW

The Arizona Court of Appeals' decision is unpublished. *State v. Clark*, Nos. 1 CA-CR 03-0851 and 1 CA-CR 03-0985 (Ariz. App. Jan. 25, 2005). (J.A. 336-54.) The Arizona Supreme Court's order denying discretionary review without comment is also unpublished. (J.A. 355.)

## STATEMENT OF JURISDICTION

The Arizona Court of Appeals entered its judgment on January 25, 2005. (J.A. 336.) The Arizona Supreme Court denied discretionary review on May 25, 2005. (J.A. 355.) Petitioner filed his Petition for Writ of Certiorari in this Court on August 17, 2005, and this Court granted the petition on December 5, 2005. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

## PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

Arizona Revised Statutes § 13-502(A) provides in relevant part as follows:

> A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did

> not know that the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. . . .

Arizona Revised Statutes § 13-1105(A)(3) provides that a person commits first degree murder if:

> Intending or knowing that the person's conduct will cause the death of a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

## STATEMENT OF THE CASE

On July 27, 2000, Clark was indicted on one count of first-degree murder under Arizona Revised Statutes § 13-1105(A)(3) for intentionally or knowingly killing a law enforcement officer acting in the line of duty. (R.O.A. at 3.) The State alleged that Clark had shot and killed Flagstaff Police Officer Jeff Moritz on June 21, 2000. (*Id.*) The trial court found Clark incompetent to stand trial and ordered that he be treated at the Arizona State Hospital until restored to competency. (*Id.* at 156-57.) After Clark received treatment, the trial court found that he had been restored to competency and ordered him to stand trial. (*Id.* at 305.) Clark waived his right to a jury trial and tried the matter to the court. (*Id.* at 324; R.T. 7/28/03, at 2-11.)

### A. Facts of the Crime.

At the time of the murder, seventeen-year-old Clark lived with his parents in the University Heights neighborhood of Flagstaff, Arizona. (R.T. 8/5/03, at 95-97.) He had an extreme dislike for police officers and law enforcement. (R.T. 8/7/03, at 58.) In April or May 2000, Jason Tackett,

Clark's classmate at Flagstaff High School, heard Clark mumble to himself at a fast-food restaurant that someone had been arrested unjustly and that he wanted to prove his point to the police. (*Id.* at 17-18.)

"A couple of weeks" before Clark shot Officer Moritz, Clark approached Tackett, who was having a barbeque with acquaintances in Thorpe Park in Flagstaff. (*Id.* at 8-10.) When Tackett greeted Clark, Clark "kind of went off about [how] he wanted to shoot Officer Moritz to get the emergency response out there, and [said] he was going to hide up in the hills with a rifle and start picking them off like a sniper would." (*Id.* at 11.) "Them" referred to police officers. (*Id.*) Clark stated, "If I came up here with my .22 caliber hand pistol . . . and started firing off, when the police come, I will get them out of their cars and start – I have rifles and I'll start shooting them in the head." (*Id.* at 16-17.)

In the early morning hours of June 21, 2000, Clark entered his brother's bedroom while his brother was sleeping and took the keys to his brother's truck. (R.O.A. at 369.) He then repeatedly drove the truck around a nearby neighborhood for about forty minutes, disturbing the residents by blaring loud music from the stereo. (R.T. 8/5/03, at 30, 95, 145-46, 149, 179-80.) In the stereo was a compact disc by the rap artist Dr. Dre. (J.A. at 115-16.) The lyrics of the songs on the disc "contained many antisocial attitudes," including the phrase "fuck the cops." (*Id.* at 116.) Clark circled one block more than twenty times. (R.T. 8/5/03, at 146-48.) Neighbors called 9-1-1 to report the disturbance. (*Id.* at 31, 148.)

Officer Moritz responded to the call at 4:42 a.m. (*Id.* at 88-89.) When he spied the truck, he turned on the patrol

car's emergency lights and siren. (*Id.* at 30, 122, 180.) When Clark did not stop, Officer Moritz reported to the dispatcher, "I have one running on me – running from me on Gillenwater." (*Id.* at 63.) Clark pulled over fifty seconds later, and Officer Moritz gave the dispatcher the truck's license number and stated, "I'll be out with him." (*Id.*) Officer Moritz commanded Clark to stay in the truck. (R.T. 8/6/03, Taylor Transcript, at 49.)

Neighbors heard gunshots – a volley of small caliber shots followed within five seconds by two larger caliber shots. (R.T. 8/5/03, at 29, 67-68, 181.) Thirty seconds after Officer Moritz left his patrol car to approach Clark, he reported to the dispatcher, "999,[1] I've been hit. 999, I've been hit." (*Id.* at 63.) Officer Moritz clutched his chest and stumbled toward a house, calling out, "Help me, somebody help me," and falling on his back after four steps. (*Id.* at 183, 185-86.) He had been shot once in the shoulder, and the bullet had severed a major artery and vein, killing him. (*Id.* at 32, 90-91; R.T. 8/6/03, Partial Transcript, at 8-10.) Clark fled toward his house. (R.T. 8/5/03, at 34, 65; R.T. 8/6/03, Taylor Transcript, at 80.)

Based on the truck's registration, police went to Clark's house and interviewed his parents, who indicated that Clark was missing. (R.T. 8/5/03, at 96-98.) The police began searching the neighborhood. (R.T. 8/6/03, at 115.) At 9:00 p.m., an officer spotted Clark, but Clark eluded him. (*Id.* at 116-17.) Officer Eske, who was stationed at Clark's house, saw Clark crouching behind some rocks near the house at 9:02 p.m. (R.T. 8/7/03, at 61, 63.) Clark began

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[1] "999" means "officer needs assistance immediately." (R.T. 8/5/03, at 91.)

walking away, looking behind him at a parked police car. (*Id.* at 65.) When Clark observed Officer Eske on the deck of the house, he ran. (*Id.*) Officer Eske chased him. (*Id.* at 66.)

Other police officers joined the chase, yelling at Clark to stop, but he continued running. (*Id.* at 74-75.) One officer illuminated Clark with a flashlight, and another officer pointed his weapon at Clark. (*Id.* at 107.) The officer's weapon had a laser sight, and once the laser alighted on Clark's chest, he surrendered. (*Id.* at 107, 112.) Clark asked, "What's this all about?," and an officer asked him where the gun was. (*Id.* at 81, 119.) Clark replied sarcastically with a forced tone, "What gun? I don't know anything about a gun." (*Id.* at 119-20.)

Clark had gunpowder residue on his hands, and police found a .22 caliber revolver stuffed into a knit cap near a shed in the vicinity. (*Id.* at 94, 114-15.) Biological material on the revolver and the cap contained DNA that matched Clark's DNA. (R.T. 8/8/03, at 66-70.) Ballistics testing established that the revolver had fired the bullet that killed Officer Moritz. (*Id.* at 33.)

**B. Clark's Defense.**

At the close of the State's evidence, Clark moved for a judgment of acquittal, claiming that the State had failed to prove that he had intended to kill a police officer. (J.A. at 3-4.) In response, the prosecutor recounted the circumstantial evidence that showed that Clark had known that Officer Moritz was a police officer and intended to kill him. (*Id.* at 4.) The trial court denied the motion. (*Id.* at 5-6.)

Clark then raised the affirmative defense of insanity, which, if proved by clear and convincing evidence, would entitle him to a "guilty except insane" verdict and to placement in the Arizona State Hospital rather than imprisonment. (R.T. 8/12/03, at 24.) Clark claimed, however, that (1) Arizona's insanity-defense statute is unconstitutional because the statute omits the "nature and quality" component of the traditional *M'Naghten* Rule; (2) placing the burden of proving insanity on a defendant violates due process; and (3) Arizona's insanity defense statute "shifts the burden of proof to [a defendant] on the specific intent element of [the] crime." (R.O.A. at 374.)

The State responded that the Arizona Supreme Court had held in *State v. Mott*, 931 P.2d 1046, 1050 (Ariz. 1997), that when the Arizona Legislature adopted Arizona's criminal code it specifically rejected the use of psychological testimony to negate mens rea. (R.O.A. at 376.) The State also noted that the Arizona Supreme Court ruled that the Legislature's action did not violate defendants' due process rights. *Mott*, 931 P.2d at 1051-54. (R.O.A. at 376.)

After considering the pleadings and hearing arguments in chambers, the trial judge ruled that *Mott* made evidence of Clark's mental illness inadmissible on the issue of his mens rea. (J.A. at 8-9.) He placed no restriction on the admission of that evidence, however, because "it goes to the insanity issue and because we're not in front of a jury." (*Id.* at 9.) He gave Clark the opportunity to make an offer of proof regarding the relevance of his mental illness to the mens rea:

> At the end, I'll let you make an offer of proof as to the intent, the *Mott* issues, but I still think the supreme court decision is the law of the land in

> this state. . . . I will certainly allow you to preserve the issue; you can argue or not argue, but you can make an offer of proof at the conclusion of the case. . . . And then at least that preserves it on appeal if something happens later down the road.

(*Id.*) Clark's counsel understood the ruling. (R.T. 8/19/03, at 6.)

Clark then presented testimony from classmates, school officials, and his family recounting instances of his bizarre, paranoid, and aggressive behavior during the year preceding the shooting. (R.T. 8/12/03, at 32, 61; R.T. 8/19/03, at 7, 23, 41, 56, 64, 80, 88, 110, 123, 134; R.T. 8/20/03, at 4, 54, 86, 164, 178, 193; R.T. 8/21/03, at 4, 61, 67, 81.) On cross-examination, the witnesses admitted that Clark had used drugs and alcohol during that time. (R.T. 8/12/03, at 52-54, 67-70; R.T. 8/19/03, at 33, 37, 61-62, 74-75, 85-86, 116, 130, 140-41; R.T. 8/20/03, at 47, 50, 77-78, 143, 146, 170-71; R.T. 8/21/03, at 30-31, 64, 79, 90.)

Dr. Barry Morenz also testified. (J.A. at 10.) He had examined Clark, and he stated that Clark suffered from paranoid schizophrenia. (*Id.* at 30.) He observed that Clark had paranoid delusions about aliens, had engaged in bizarre behavior, and had very poor and bizarre hygiene and grooming habits. (*Id.* at 32-33.) He did not believe that Clark was capable of creating an ambush to kill a police officer. (*Id.* at 38-39.) He concluded that Clark had been insane under Arizona law when he shot Officer Moritz:

> [N]o one knows exactly what was on Eric's mind, but given how psychotic he was before and immediately after and everything we know about schizophrenia, I think that it is fair and probable that he did not understand what he was doing

> was, you know – that they [sic] did not understand right from wrong.

(*Id.* at 48-49.)

On cross-examination, however, Dr. Morenz admitted that he could not conclusively state that Clark did not know that killing Officer Moritz was wrong. (*Id.* at 73.) He also admitted that the mere fact that Clark had been psychotic before and after the murder was "alone not enough for an insanity finding." (*Id.* at 90.) He further acknowledged that Clark's creation of a noise disturbance in a quiet neighborhood in the early morning hours was consistent with an intent to lure a police officer to the scene of the murder. (*Id.* at 77-78.)

The State called Dr. John Moran in rebuttal. (*Id.* at 105.) He, too, had examined Clark, and he agreed that Clark was a paranoid schizophrenic. (*Id.* at 136.) But he also concluded to a reasonable degree of psychological certainty that Clark was not insane when he killed Officer Moritz. (*Id.* at 158.) Dr. Moran found that Clark's actions before the shooting – of stealing the keys to his brother's truck, getting the pistol, driving around the neighborhood with loud music blaring – and his actions after the shooting – of eluding the police, hiding the pistol, and surrendering when confronted with weapons – indicated that he appreciated the wrongfulness of his conduct. (*Id.* at 158-67.)

At the conclusion of the evidence, the parties made closing arguments. (*Id.* at 282.) Although Clark's counsel argued that Clark had been insane and had not known right from wrong when he killed Officer Moritz, he made no offer of proof that the evidence of his mental illness negated the mens rea for the crime. (*Id.* at 299.)

The trial court considered the arguments and found that the State had proved beyond a reasonable doubt that Clark shot and killed Officer Moritz. (*Id.* at 332.) The trial court also found that Clark had not proved by clear and convincing evidence that he was insane at the time of the shooting. (*Id.* at 332-34.) The trial court found that while Clark had proved that he suffered from a mental disease or defect, he had failed to prove that he did not know that the killing was wrong. (*Id.* at 333-34.) In making that determination, the trial court specifically relied on (1) Clark's comments about luring police officers weeks before the shooting, (2) the facts showing that Clark had engaged in behavior designed to attract law enforcement, (3) the facts showing that Clark knew that Officer Moritz was a police officer, (4) the facts showing that Clark had fled and had eluded police after the shooting, (5) Clark's disposal of the murder weapon, and (6) Clark's surrender to police at gunpoint. (*Id.*) Thus, the trial court found Clark guilty of first-degree murder. (*Id.*)

The trial court sentenced Clark to life imprisonment without the possibility of release for 25 years. (R.T. 10/2/03, at 73.) Clark moved to vacate the judgment, renewing his claims that Arizona's insanity defense was unconstitutional and that Arizona's decision not to allow psychological evidence to negate mens rea violated his due process rights. (R.O.A. at 406.) He again failed to indicate what evidence of mental illness would have negated mens rea. The trial court denied the motion. (R.O.A. at 424.)

### C. Appellate Proceedings.

Clark appealed his conviction and sentence. (J.A. at 337.) He argued, in relevant part, that (1) Arizona's

insanity defense violates due process by eliminating the "nature and quality" component of the *M'Naghten* Rule and (2) Arizona's exclusion of mental disease or defect evidence to negate mens rea violates due process. (*Id.* at 347-48.) The Arizona Court of Appeals rejected those claims and affirmed Clark's conviction and sentence. (*Id.* at 354.)

The court of appeals rejected Clark's first claim for three reasons. (*Id.* at 349.) First, due process does not require a State to provide any insanity defense. (*Id.*) Second, this Court has recognized that States are free to define an insanity defense as they see fit. (*Id.*, citing *Patterson v. New York*, 432 U.S. 197 (1977).) Third, the "nature and quality" component does not add significantly to the insanity test because "[i]t is difficult to imagine that a defendant who did not know the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (*Id.* at 349-50.)

The court of appeals rejected Clark's second claim for two reasons. (*Id.* at 351-52.) First, Clark made no offer of proof to the trial court that he was incapable of knowing that he was killing a police officer. (*Id.* at 352.) Second, even if he had proffered such evidence, the court of appeals, like the trial court, was bound to follow the Arizona Supreme Court's decision in *Mott*. (*Id.*)

Clark sought discretionary review of the court of appeals' decision in the Arizona Supreme Court, but the supreme court denied review without comment. (*Id.* at 355.)

## SUMMARY OF THE ARGUMENT

1. Arizona's definition of insanity does not violate due process. Arizona's insanity test is whether a person has a "mental disease or defect" so severe that the person "did not know the criminal act was wrong." Arizona Revised Statutes § 13-502(A). Clark argues that this definition violates due process because it does not allow a defendant to be judged insane if he did not understand the "nature and quality of his act," a traditional component of the *M'Naghten* Rule. He calls for this Court to establish as the constitutional minimum definition of insanity one that includes a "nature and quality" component.

But this Court has steadfastly resisted calls to "constitutionalize" the insanity defense and has never said that States are required to adopt one. *Medina v. California*, 505 U.S. 437, 449 (1992). In doing so, this Court has recognized that the States have the primary responsibility to prosecute crimes and the concomitant freedom to define elements of offenses and affirmative defenses. This Court has been especially chary of establishing constitutional rules regarding the use of psychological evidence in determining guilt or innocence and criminal responsibility because the meaning and relevance of that evidence is so variable and uncertain to psychiatrists and lawyers alike. Mandating any definition of insanity under the Due Process Clause would infringe upon the States' historic authority to control and define the substantive criminal law and would freeze the relationship of psychiatry and law into a particular constitutional mold that scientific, legal, and philosophical advances and changes could readily render obsolete.

Moreover, nothing indicates that the "nature and quality" component of the *M'Naghten* Rule is a fundamental principle of justice worthy of the Due Process Clause's protection. The "nature and quality" component is not even fundamental to the *M'Naghten* Rule itself. While the *M'Naghten* opinion used the phrase "nature and quality," the heart of the *M'Naghten* Rule is whether the defendant knew that his conduct was wrong – the very test that Arizona uses. Historically, States have defined the *M'Naghten* Rule using various phrases centering on whether a defendant knew that his conduct was wrong. This Court has even referred to the *M'Naghten* Rule as the "right-wrong" test. *Powell v. Texas,* 392 U.S. 514, 537 (1968) (plurality opinion). Moreover, some courts historically omitted the "nature and quality" component of the *M'Naghten* Rule, and some courts and legal scholars believe that the question whether a person knew that his conduct was wrong subsumes the question whether the person understood the "nature and quality of his act." As the Arizona Court of Appeals noted in resolving this case, "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (J.A. at 350.) Due process therefore does not require States to include a "nature and quality" component in their insanity definitions.

2. Due process does not require Arizona to admit psychological evidence to negate the mens rea of a crime. Clark claims that precluding him from presenting evidence of his mental illness violated due process because it prevented him from presenting a defense. But this Court should not even consider his claim because the Arizona Court of Appeals resolved it on the state-law procedural ground of

waiver. Clark presented the evidence of his mental illness to prove the affirmative defense of insanity, but he never demonstrated to the trial court – even after the trial court invited him to make an offer of proof – how that evidence was relevant to the mens rea element of his murder charge (whether he intentionally or knowingly killed a police officer acting in the line of duty). Evidence that a defendant may be insane does not necessarily prove lack of mens rea, and Clark never showed the trial court a connection between his mental illness and his alleged inability to know that he was killing a police officer. The Arizona Court of Appeals found that Clark did not make an adequate offer of proof (J.A. at 351-52), and this Court should not consider the merits of Clark's claim.

Even if this Court considers the merits, however, Clark is wrong that he has a due process right to present his psychological evidence to negate the mens rea of murder. This Court has considered this precise issue three times – in *Troche v. California*, 280 U.S. 254 (1929) (per curiam); *Coleman v. California*, 317 U.S. 596 (1942) (per curiam); and *Fisher v. United States*, 328 U.S. 463 (1946). This Court dismissed the appeals in the first two cases for want of a substantial federal question – indicating its approval of the California Supreme Court's rulings that Troche and Coleman had no due process right to admit evidence of their mental illnesses to negate the mens rea of murder. This Court then recognized in *Fisher* that requiring the District of Columbia to instruct jurors that they could consider evidence of Fisher's mental illness on the issue of mens rea would force the District to adopt a "diminished capacity" defense, which was "properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." 328 U.S. at

476. States historically have had the authority to regulate the admission of evidence and to define crimes, particularly with regard to matters pertaining to psychological evidence. Requiring States to admit psychological evidence on the issue of mens rea when they have chosen not to do so invades the States' province of defining and regulating criminal law.

State courts and State legislatures have for many reasons prohibited the admission of psychological evidence to negate mens rea. Some States share this Court's wariness of such evidence. Some States have determined that permitting a "diminished capacity" defense in this sense is unwarranted or is bad public policy. Some States want to protect society through "guilty-except-insane" verdicts rather than to create the risk that mentally ill criminals could be set free with no requirement of treatment. This Court has always respected the States' right to regulate such matters.

When the Arizona Legislature enacted its criminal code, it specifically rejected a provision that would have allowed a defendant's psychological condition to negate the mens rea. By doing so, it defined mens rea in Arizona without regard to a defendant's psychological condition, making any evidence of a defendant's psychological condition irrelevant to mens rea. This comports with due process, as this Court recognized in the analogous decision of *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion). There, this Court found no due process violation when the Montana Legislature defined its mens rea elements without regard to the condition of voluntary intoxication. *Id.* at 58 (Ginsburg, J., concurring). Because a defendant's psychological condition does not negate mens rea in Arizona, Clark suffered no due process violation

when the trial court refused to consider his psychological evidence on the mens rea issue.

## ARGUMENT

### I. The Fourteenth Amendment's Due Process Clause Does Not Require a State to Enact the Complete *M'Naghten* Rule as the Test for Insanity Because No Fundamental Principle of Justice Requires a State to Enact an Insanity Defense or Any Particular Definition of Insanity.

In 1993, the Arizona Legislature amended its insanity statute, Arizona Revised Statutes § 13-502(A), to delete reference to the defendant's knowledge of the "nature and quality" of his act. 1993 Ariz. Sess. Laws, ch. 256, § 2. The new insanity test is simply whether the defendant had such a severe mental disease or defect that he "did not know the criminal act was wrong." 1993 Ariz. Sess. Laws, ch. 256, § 3. Clark contends that this legislative decision violates due process. (Petitioner's Opening Brief at 32.) He claims that due process requires a State to adopt as the test for insanity the entire traditional *M'Naghten* Rule, which includes a "nature and quality" component. (*Id.* at 40.)

Clark's claim contravenes this Court's understanding of due process and violates the States' historical authority to define elements of criminal offenses and affirmative defenses, particularly insanity defenses. Moreover, Clark's argument fails regardless of any due process requirement because Arizona's insanity definition necessarily encompasses the question whether a defendant understood the nature and quality of his act.

### A. "Constitutionalizing" a Particular Insanity Defense Violates the States' Historical Authority to Define Elements of Criminal Offenses and Affirmative Defenses.

The Due Process Clause does not prohibit the Arizona Legislature from choosing to define insanity only in terms of whether a defendant knows his conduct is wrong: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). State legislative judgments in this area are due "substantial deference" because States have "considerable expertise" regarding criminal law and procedure, and the criminal process is "grounded in centuries of common-law tradition." *Medina v. California*, 505 U.S. 437, 445-46 (1992). A State's legislative choice in ordering its criminal justice system will not violate the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Establishing that a fundamental principle exists is a "heavy burden" that is primarily guided by historical practice. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion).

Assessing and assigning accountability for "antisocial deeds" always has been the States' prerogative:

> The doctrines of actus reus, mens rea, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving

> aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. The process of adjustment has always been thought to be the province of the States.

*Powell v. Texas*, 392 U.S. 514, 536 (1968) (plurality opinion). Thus, States have the "freedom to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring); *id.* at 91 ("The power of the States to determine the existence of criminal insanity following the establishment of the underlying offense is well established.") (Kennedy, J., dissenting). This Court has never "said that the Constitution requires the States to recognize the insanity defense." *Medina*, 505 U.S. at 449.

This Court addressed the application of due process to States' insanity defenses in *Leland v. Oregon*, 342 U.S. 790 (1952). In that case, Leland argued that due process prohibited Oregon from requiring him to prove the affirmative defense of insanity beyond a reasonable doubt. *Id.* at 793. He also claimed that Oregon had violated due process by enacting a statute prohibiting what amounted to an "irresistible impulse" defense. *Id.* at 800. Regarding the burden-of-proof issue, the Court had unhesitatingly held that requiring a defendant to prove insanity beyond a reasonable doubt does not violate due process. *Id.* at 799.

Regarding Oregon's prohibition of an "irresistible impulse" test for insanity, the Court specifically declined to impose any constitutionally mandated insanity defense. The Court noted that "[k]nowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions," *id.* at 800, and that psychiatry

had not progressed to a point that would compel the Court to hold that the "concept of ordered liberty" required States to adopt instead the "irresistible impulse" test, *id.* at 801. The choice of a test for legal insanity "involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement. . . ." *Id.*

Justices Frankfurter and Black, while dissenting on the burden-of-proof issue, agreed that due process does not require a State to adopt any particular insanity defense because "[s]anity and insanity are concepts of incertitude" "given varying and conflicting content at the same time and from time to time by specialists in the field." *Id.* at 803. The Justices found that at the existing state of scientific knowledge, "it would be indefensible to impose upon the States, through the due process of law, . . . one test rather than another . . . , and thereby to displace a State's own choice of such a test." *Id.*

In *Powell*, the Court again considered the States' authority to determine substantive rules for criminal responsibility. Texas had criminalized public drunkenness, and Powell claimed that his conviction for that offense violated the Eighth Amendment because his chronic alcoholism made it impossible for him to avoid public drunkenness. 392 U.S. at 531. Powell attempted to bring his case within the ambit of *Robinson v. California,* 370 U.S. 660, 667 (1962), which held that the Eighth Amendment prohibits a State from punishing a person for his status as a narcotics addict. *Powell*, 392 U.S. at 532. The Court rejected the claim, noting that Texas was punishing him for public drunkenness, not for his status as a chronic alcoholic. *Id.*

The Court also recognized that accepting Powell's argument would mean that any defendant who presented evidence of volitional impairment would state a constitutional claim if the State did not recognize such a defense and based its criminal responsibility determination on "some different and perhaps lesser standard, e.g., the right-wrong test of M'Naghten's Case." *Id.* at 536. This would establish a "constitutional doctrine of criminal responsibility," *id.* at 534, invading the States' historical "province" to assign criminal responsibility, *id.* at 536. This Court refused to "constitutionalize" an insanity test: "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* "Constitutionalizing" an insanity test would inhibit States from experimenting with different techniques to deal with social problems:

> [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet time to write the Constitutional formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or lawyers.

*Id.* at 536-37; *see also id.* at 546 (Black, J., concurring) ("[T]o impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.").

Skepticism about the certainty of psychiatric evidence has continued since *Leland* and *Powell*. *See Jones v. United States,* 463 U.S. 354, 365 n.13 (1983) ("The only certain thing . . . about the present state of knowledge and therapy regarding mental disease is that science has not

reached finality of judgment.") (quoting *Greenwood v. United States*, 350 U.S. 366, 375 (1956)). Given the scientific uncertainty regarding psychiatric knowledge, "courts should pay particular deference to reasonable legislative judgments." *Id.*

But imposing a "constitutional formula" for the definition of insanity in the face of this uncertainty is exactly what Clark now urges. Clark argues that due process prohibits a State from enacting a definition of insanity narrower than the complete *M'Naghten* Rule. (Petitioner's Opening Brief at 40.) To satisfy his heavy burden of proving that the complete *M'Naghten* Rule is a fundamental principle of justice, Clark relies on the obvious historical fact that judicial systems have long considered mental illness in determining criminal responsibility and claims that a majority of States have enacted an insanity defense that includes the complete *M'Naghten* Rule or a "broader" test. (Petitioner's Opening Brief at 34-39.)

Neither justification supports mandating the *M'Naghten* Rule as the constitutional test for insanity. While judicial systems have always considered mental illness in some fashion and to some degree in determining criminal responsibility, nothing in Clark's historical recitation establishes any particular way of accounting for mental illness – much less any particular definition of insanity – as fundamental to justice. English courts began exempting the mentally ill from punishment for their criminal acts using a cognitive – "wild beast" – test in *Rex v. Arnold*, 16 How. St. Tr. 695 (10 George I A.D. 1724); moved to a test whether the mental illness "caused" the criminal act in *Rex v. Hadfield*, (K.B. 1800) 27 St. Tr. 1281 (1820); and then returned in *M'Naghten*'s case to a

cognitive test of knowing right from wrong in *Regina v. M'Naghten*, 4 St. Tr. 847 (1843). *See* Rita J. Simon & David E. Aaronson, *The Insanity Defense* 10-14 (Praeger 1988).

American jurisdictions enacted various tests, from formulations of the *M'Naghten* Rule to the "irresistible impulse" test to the "product" test of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), or some combination thereof. *See Insanity Defense*, *supra*, at 14-19. In 1962, the American Law Institute proposed an insanity test requiring proof that a defendant lacked "substantial capacity" "either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law" because of a mental disease or defect. American Law Institute, *Model Penal Code*, § 4.01 (Philadelphia: A.L.I. 1962). Some States have adopted this definition in some form. (Petitioner's Opening Brief at 38 n.42). One State – New Hampshire – provides no definition of insanity. *See Abbott v. Cunningham*, 766 F. Supp. 1218, 1226 (D.N.H. 1991) (upholding insanity statute against due process challenge). Other States have chosen to abolish the insanity defense altogether. *See State v. Searcy*, 798 P.2d 914, 916 (Idaho 1990); *State v. Bethel*, 66 P.3d 840, 844 (Kan. 2003); *State v. Korell*, 690 P.2d 992, 996 (Mont. 1984); *State v. Herrera*, 895 P.2d 359, 361 (Utah 1995). The continuing debate about the appropriate definition of insanity among the States demonstrates that it is still "not yet time to write" a "Constitutional formula[]" for insanity. *Powell*, 392 U.S. at 537.

Clark portrays the *M'Naghten* Rule's "nature and quality" component as significant and immutable. (Petitioner's Opening Brief at 33-37.) But that is inaccurate. Older court decisions phrased the *M'Naghten* Rule merely in terms of knowing right from wrong or good from evil.

*See* Henry Weihofen, *Mental Disorder as a Criminal Defense* 68-69 (Dennis & Co. 1954) (collecting cases). Other courts described the Rule variously as whether the person had the capacity to know his act was wrong, whether the person was conscious that he was doing what he ought not do, whether the person had sufficient reason to know he was doing a wrong act, or some other permutation of these phrases. *See id.* at 69-71. And although the *M'Naghten* opinion itself uses the phrase "nature and quality" in its discussion of the proper test for insanity, the opinion makes clear that the primary question is the knowledge of right and wrong:

> If the accused was conscious that the act was one which he ought not to do, and if that act was [contrary to law], he is punishable, and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know he was doing an act that was wrong: and this course we think is correct.

*M'Naghten*, 4 St. Tr. at 932 (quoted in *Mental Disorder*, *supra*, at 61). This Court, too, has referred to the *M'Naghten* Rule as the "right-wrong" test. *Powell*, 392 U.S. at 537; *Leland*, 343 U.S. at 800 ("right and wrong").

While "nature and quality" has been included as part of the *M'Naghten* Rule in many cases in various phrasings, *see Mental Disorder*, *supra*, at 71 (collecting cases), historically it has not been viewed as an essential component of the Rule, *see* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 36, at 277 (West 1972) ("[I]n many jurisdictions the M'Naghten rule is stated merely in terms of the defendant's ability to distinguish right from wrong, and there is no mention of or instruction on knowledge of the nature and quality of the act."). This fact, along with

the fact that jurisdictions have changed definitions of insanity – or in some instances eliminated the defense altogether – based on changes in views on the role mental illness should play in criminal justice systems, demonstrates that the *M'Naghten* Rule, complete or partial, is not a fundamental principle of justice due process protects.

Clark claims that a "vast majority" of States have defined insanity to include some concept equivalent to the *M'Naghten* Rule's "nature and quality" component. (Petitioner's Opening Brief at 37-39.) But only a minority of States – twenty – have such a component. Clark counts as part of his majority the seventeen States that have adopted some version of the American Law Institute's insanity definition, which requires, in relevant part, proof that a defendant lacked "substantial capacity" to "appreciate the criminality (wrongfulness) of his conduct." *Model Penal Code*, § 4.01. This definition has no concept equivalent to "nature and quality." In fact, it reinforces the fact that knowledge of wrongfulness alone *is* a common test for insanity. Moreover, that a number of States have a particular definition carries little weight in due process analysis. *See Leland*, 343 U.S. at 798 (due process did not prohibit a State from requiring that insanity be proved beyond a reasonable doubt even though only one State – Oregon – had done so). Because Clark has failed to carry his "heavy burden" of proving that the *M'Naghten* Rule's "nature and quality" component is a fundamental principle of justice, Arizona's insanity statute comports with due process.

### B. Arizona's Definition of Insanity Necessarily Encompasses the Question Whether a Defendant Understood the Nature and Quality of His Act.

Although Clark's due process argument fails as a matter of constitutional law, it also fails as a matter of fact. Even if due process did require Arizona to include in its insanity definition the question whether the defendant understood the nature and quality of his act, Arizona's definition necessarily encompasses that question. Arizona's definition of insanity requires proof that the defendant "was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." Arizona Revised Statutes § 13-502(A). Arizona defines "wrong" in this context according to "community standards of morality," which includes an understanding that the act is legally and morally wrong. *State v. Corley*, 495 P.2d 470, 473 (Ariz. 1972); *see also State v. Tamplin*, 986 P.2d 914, 916-17 (Ariz. App. 1999) (definition of "wrong" remains the same under current insanity statute).

Knowledge that the act is legally and morally wrong necessarily requires an understanding of the act's nature and quality as set forth in the *M'Naghten* Rule. As the court of appeals recognized in this case, "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (J.A. at 350.) Other courts concur in this judgment. *See Maas v. Territory*, 63 P. 960, 961 (Okla. 1901) ("[K]nowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same."); *Montgomery v. State*, 151 S.W. 813, 817 (Tex. Cr. App. 1912) ("[I]t is almost inconceivable that a man could be sane

enough to appreciate and know the nature and quality of an act and yet not know whether it was right or wrong to commit such an act."); *Jessner v. State*, 231 N.W. 634, 639 (Wis. 1930) ("[T]he two phrases express exactly the same thing, but in different languages."). Legal scholars as well have concluded that knowing whether conduct is wrong encompasses understanding the conduct's "nature and quality." *See Insanity Defense*, *supra*, at 14; Abraham S. Goldstein, *The Insanity Defense* 49 (Yale University Press 1967); Gregory Zilboorg, *Misconceptions of Legal Insanity*, 9 Am. J. Orthopsychiatry 540, 552-53 (1939). The Arizona Supreme Court recognized that the "right-wrong" component of the *M'Naghten* Rule subsumes the "nature and quality" component when it declined to reverse a conviction because a jury instruction on insanity omitted the "nature and quality" language. *State v. Chavez*, 693 P.2d 893, 894 (Ariz. 1984). Even Clark's amicus curiae concedes that (1) Arizona appears to have defined knowledge that conduct is right or wrong sufficiently broadly to include within that definition an understanding of the act's nature and quality, and (2) this satisfies any due process requirement. (Brief of Amicus Curiae American Psychiatric Association, American Psychological Association, and American Academy of Psychiatry and the Law at 27-28.)

Consequently, even if due process required a State's insanity defense to include the *M'Naghten* Rule's "nature and quality" component, Arizona complies with that requirement. Arizona's insanity statute therefore does not violate due process.

## II. The Fourteenth Amendment's Due Process Clause Does Not Prohibit a State from Defining Mens Rea Without Regard to Mental Disease or Defect Because No Fundamental Principle of Justice Requires a State to Account for Mental Disease or Defect in Any Particular Way.

In *State v. Mott*, Mott wanted to defend against charges of child abuse and felony murder by presenting evidence that she suffered from Battered Woman's Syndrome, which prevented her from intentionally or knowingly permitting her boyfriend to beat her child to death. 931 P.2d at 1049. She claimed that the trial court violated due process by excluding that evidence. *Id.* The Arizona Supreme Court rejected her claim, ruling that when the Arizona Legislature had enacted Arizona's criminal code, it had specifically declined to adopt a defense of "diminished capacity" – defined as evidence of mental disease or defect that negates a crime's mens rea. *Id.* at 1050.

Clark claims that the trial court's decision to follow *Mott* and to refuse to consider his mental disease or defect evidence in determining whether he had the requisite mens rea for first-degree murder violated due process because it denied him the opportunity to present a defense.[2] (Petitioner's Opening Brief at 13.) This Court

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[2] Clark also claims that excluding his evidence of mental disease or defect prevented him from providing innocent explanations for his behavior to refute the State's case that his actions proved his intent to kill a police officer. (Petitioner's Opening Brief at 13.) To the extent that this is a separate argument, Clark never presented it to the Arizona Court of Appeals in his opening brief or to this Court in the Petition for Writ of Certiorari. Because the argument was not "pressed or passed upon" in the state appellate court or raised at the certiorari stage, this Court should decline to consider it. *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) ("We decline to address . . . questions which were neither

(Continued on following page)

should reject this contention for two reasons. First, this Court should not even consider the claim because the Arizona Court of Appeals resolved it on independent state-law grounds. Second, no fundamental principle of justice prohibits Arizona from defining the mens rea element without regard to mental disease or defect.

### A. The Arizona Court of Appeals Resolved Clark's Claim on Independent State-Law Grounds.

State courts are "the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The interests of comity and federalism require this Court to defer to state court decisions on state-law issues. *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1874) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."). The Arizona Court of Appeals ruled that Clark had waived his claim under state law. (J.A. at 352.) In the interest of comity and federalism, this Court should decline to consider this claim.

The Arizona Court of Appeals resolved Clark's claim on state-law grounds. The court noted that the trial court had not prevented Clark from presenting psychological evidence, despite *Mott*'s holding to the contrary, and had

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raised nor decided below, and were not presented in the petition for writ of certiorari."); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) ("[I]t is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.").

invited him to make an offer of proof regarding the evidence's relevance to his mental state. (J.A. at 351-52.) The court then explained that "aside from the evidence to prove his insanity generally, Clark specified no evidence in his offer of proof[3] that demonstrated he was not capable of knowing he was killing a police officer." (*Id.* at 352.) Although Clark had presented evidence that he was a paranoid schizophrenic – obviously relevant to his insanity defense – he was silent before the trial court about how that evidence might have shown that he did not knowingly kill a police officer. Insanity and mens rea are separate issues:

> Although as the state court's instructions in *Leland* recognized, evidence relevant to insanity may also be relevant to whether the required mens rea was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.

*Wilbur*, 421 U.S. at 705-06 (Rehnquist, J., concurring) (internal citation omitted). Consequently, Clark had the duty – and the trial court gave him the opportunity – to show the relevance of his mental disease or defect evidence to whether he knew he was killing a police officer so that the state appellate court could evaluate his due process claim.

By failing to draw any connection between his evidence and the fact he wanted to prove, Clark waived this

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[3] Clark effectively conceded below that he made no "offer of proof." (*See* Respondent's Appendix I to the Response to Petition for Writ of Certiorari at 20.) The court of appeals apparently was referring to Clark's closing argument at trial on the insanity defense.

claim on appeal, as the court of appeals found. (J.A. at 352.) *See State v. Gulbrandson*, 906 P.2d 579, 592 (Ariz. 1995) ("Defendant did not properly preserve this issue for appeal because his counsel failed to make an offer of proof" concerning the defense expert's testimony of the defendant's mental state of mind at the time of the offense); *State v. Walton*, 769 P.2d 1017, 1027-28 (Ariz. 1989) (evidence concerning a witness's psychiatric history need not be admitted if "the defendant fails to make an offer of proof that the witness' perception or memory was affected by [a mental] illness"); *State v. Fendler*, 622 P.2d 23, 36 (Ariz. App. 1980) (defendant's claim that he was precluded from introducing relevant evidence of his intent "fail[ed] for lack of an adequate offer of proof"). Waiver is an independent and adequate state-law ground. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (waiver "amounted to an independent and adequate state procedural ground which would have prevented direct review" in this Court). Although the court of appeals did not use the word "waiver" in its decision, particular wording is not required to find an independent and adequate state-law ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (a state court need not use "particular language" in making procedural default ruling that constitutes independent and adequate state grounds). Because the state appellate court resolved this issue on state-law grounds, this Court should decline to consider it.

### B. No Principle of Justice Requires a State to Admit Evidence of Mental Disease or Defect to Negate Mens Rea Because States Are Free to Define Elements of Criminal Offenses Without Regard to Mental Disease or Defect.

Clark contends that due process requires Arizona to admit his mental disease or defect evidence to allow him to negate the mens rea of his crime. (Petitioner's Opening Brief at 13.) He says this is so because it violates fundamental principles of justice to prevent him from refuting the State's case with relevant evidence. (*Id.* at 13-22.) His argument fails, however, because States historically have had the authority to define the elements of criminal offenses, and a State's particular definition of an element may render certain evidence – including mental disease or defect evidence – irrelevant. Arizona has chosen to define the element of mens rea in such a way that evidence of a defendant's mental disease or defect does not negate it. This choice does not violate due process.

#### 1. Due process does not require the admission of mental disease or defect evidence when a State has defined criminal offenses in such a way that mental disease or defect evidence is irrelevant.

States historically have had broad authority to define the substantive elements of criminal offenses. *See Medina*, 505 U.S. at 445 (States are due "substantial deference" in "matters of criminal procedure and the criminal process"); *Patterson*, 432 U.S. at 201-02 ("preventing and dealing with crime" is the States' "business"); *Powell*, 392 U.S. at 535-36 (doctrines of actus reus and mens rea have "always

been thought to be the province of the States"). Defining an element in a certain way may make particular evidence irrelevant to the crime because the evidence does not prove or negate that element. *See Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring) (voluntary intoxication evidence was irrelevant to negate mens rea because Montana defined mens rea without regard to voluntary intoxication). A State's decision in this area "is not subject to proscription under the Due Process Clause" unless it violates a fundamental principle of justice. *Patterson*, 432 U.S. at 201-02.

Three times this Court has considered whether due process requires a State to admit mental disease or defect evidence to negate mens rea when it is irrelevant under state law – the precise question Clark now brings – and each time the Court has found no due process violation. *See Troche v. California*, 280 U.S. 254 (1929) (per curiam); *Coleman v. California*, 317 U.S. 596 (1942) (per curiam); *Fisher v. United States*, 328 U.S. 463 (1946). *Troche* and *Coleman* each dealt with California's then-existing bifurcated trial system, in which a jury first tried a defendant's guilt presuming his sanity and then, if it found the defendant guilty and if the defendant claimed insanity, it tried the insanity issue. *People v. Troche*, 273 P. 767, 769 (Cal. 1929); *People v. Coleman*, 126 P.2d 349, 352 (Cal. 1942). Troche and Coleman claimed that this procedure violated due process because it prevented them from introducing evidence of mental illness in the trial's guilt phase to negate the mens rea elements of their crimes but allowed such evidence only at the insanity phase. *Troche*, 273 P. at 771; *Coleman*, 126 P.2d at 352. In each case, the California Supreme Court found that this procedure did not violate due process because California had determined that

evidence not rising to the level of insanity did not negate the mens rea. *Troche*, 273 P. at 772 (evidence "irrelevant and immaterial"); *Coleman*, 126 P.2d at 353 (relying on *Troche*).

Troche and Coleman each appealed their cases to this Court, which dismissed them for "want of substantial Federal question." *Troche*, 280 U.S. at 524; *Coleman*, 317 U.S. at 598. While the Court did not provide an analysis, summary dismissal of the appeals indicated its agreement with the California Supreme Court's holdings that California did not violate due process by precluding Troche and Coleman from presenting their evidence of mental illness on the mens rea element at the guilt-phase of their trials.[4] *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (summary dismissals of appeals are decisions on the merits and are accorded proper precedential effect).

The Court considered this issue again in *Fisher*. Fisher, on trial for premeditated murder in the District of Columbia, presented psychiatric evidence that he was "unable by reason of a deranged mental condition" to resist the impulse to kill the victim. 328 U.S. at 467. Although Fisher conceded that he was sane, he requested an instruction – refused by the trial court – that the jurors should "consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics" in judging whether he had premeditated and had intended to kill. *Id.* at 469 n.5. Fisher asked the Court to declare that mental disease or defect evidence that falls

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[4] Troche and Coleman's precise arguments are set forth in *Muench v. Israel*, 715 F.2d 1124, 1138-40 (7th Cir. 1982) (relying on an examination of the papers before this Court in each case).

short of insanity is nevertheless "a rel[e]vant factor" in determining whether a defendant is guilty of first-degree murder or a lesser degree of homicide. *Id.* at 473.

In rejecting Fisher's request, the Court first noted that some jurisdictions had accepted this "partial responsibility" theory and some had not. *Id.* at 473 & n.12. The Court then refused to intervene in the District of Columbia's administration of its criminal justice system:

> Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law matters not affected by Constitutional limitations or a general federal law is a matter peculiarly of local concern.

*Id.* at 476. In so ruling, this Court effectively reaffirmed its holdings in *Troche* and *Coleman* that due process does not require the admission of mental disease or defect evidence against mens rea when it is irrelevant.

Clark does not address *Troche* or *Coleman* and argues merely that *Fisher* does not hold what it clearly does hold. Clark contends that *Fisher* does not affect his argument because Fisher was allowed to present his evidence of mental disease to the jurors. (Petitioner's Opening Brief at 25.) He claims that *Fisher*'s sole issue was whether Fisher was entitled to an affirmative instruction that jurors should consider the evidence on the mens rea element, not whether the District of Columbia properly excluded the evidence. (*Id.*) But "*Fisher* stands for no such thing. *Fisher* squarely confronted the substance of the theory: the Court was not quibbling with the proffered instruction on redundancy grounds." *Muench v. Israel*, 715 F.2d 1124, 1141-42

(7th Cir. 1982). The Court believed that ruling in Fisher's favor required the District of Columbia to adopt a theory of criminal responsibility that it had not yet adopted: "For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility." *Fisher*, 328 U.S. at 476. And Justice Murphy, while dissenting from the result, precisely identified the issue before the Court: "May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder?" *Id.* at 491 (Murphy, J., dissenting). Despite Clark's contrary argument, *Fisher* stands for the proposition that due process does not require a State to admit mental disease or defect evidence to negate mens rea. "Any contrary conclusion would render *Fisher* virtually meaningless, if not disingenuous." *Muench*, 715 F.2d at 1142. *Fisher* must be taken "at its word." *Id.*

In an attempt to show that historical practice required the admission of mental disease or defect evidence on the issue of mens rea, Clark argues that the Framers considered the lack of mens rea as the basis for excusing the insane from criminal responsibility. (Petitioner's Opening Brief at 27-32.) But while the early English legal scholars indeed linked insanity to the lack of mens rea, "the insanity defense is broader than the mens rea concept." Frederica B. Koeller, *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stages*, 12 U. Pa. L. Rev. 733, 734 (1964). "There is no necessary connection between a judgment about a defendant's criminal responsibility and his mental capacity to entertain the state of mind" the crime requires.

Peter Aranella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Col. L. Rev. 827, 834 (Oct. 1977). For example, a person may be deluded about the circumstances requiring a murder – God told him to kill his neighbor over tea – and properly found insane, but he nonetheless has the requisite mens rea to commit murder. *See id.* at 833-34. Even the celebrated cases near the time of the Founding – *Rex v. Arnold* and *Rex v. Hadfield* – did not involve questions of lack of intent to kill, but questions whether the defendants suffered from delusions. *See* Daniel N. Robinson, *Wild Beasts & Idle Humours*, 129-35, 147-49 (Harvard University Press 1996). Thus, Clark is wrong that insanity was historically coterminous with lack of intent, and consequently no historical principle of justice ever required the admission of mental disease evidence to negate mens rea. Absent such a principle of justice, a State does not violate due process by defining the elements of its criminal offenses such that mental disease or defect evidence does not negate them.

### 2. Arizona has chosen to define its mens rea elements without regard to mental disease or defect, making such evidence irrelevant to mens rea.

In keeping with a State's authority to define the elements of its criminal offenses, Arizona has defined the mens rea element in such a way that a defendant's mental disease or defect does not negate the mens rea of a crime. The Arizona Supreme Court recognized this in *Mott*. 931 P.2d at 1050. The supreme court noted that when the Arizona Legislature enacted its criminal code, based largely on the Model Penal Code, it specifically rejected

the Code's provision allowing the admission of evidence of "mental disease or defect" to negate mens rea. *Id.* "The legislature's decision not to adopt this section of the Model Penal Code evidences its rejection of the uses of psychological testimony to challenge the mens rea element of a crime." *Id.* The court further noted that the Legislature had never adopted a defense of "diminished capacity," in which a mental disease or defect not rising to the level of insanity can excuse criminal responsibility. *Id.* at 1051. "Consequently, Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime." *Id.*

The Arizona Legislature's rejection of the Model Penal Code provision means that the mens rea elements of criminal offenses are defined without regard to mental disease or defect. Thus, when determining whether a defendant has intentionally or knowingly committed a criminal act, any mental disease or defect is statutorily irrelevant to the factual question. The question for the factfinder becomes whether the defendant (1) actually intended to commit the act or knew that he was committing the act or (2) committed the act under circumstances that would otherwise establish intent or knowledge but for the defendant's mental disease or defect.

This Court approved and applied this very analysis in *Egelhoff*. Egelhoff, convicted of murder, claimed that Montana's statute making evidence of voluntary intoxication irrelevant to mens rea violated due process on grounds similar to Clark's. 518 U.S. at 41 (plurality opinion). The Montana Supreme Court reversed his convictions, finding that precluding him from presenting voluntary intoxication evidence on the issue of mens rea

violated his due process right to have "all relevant evidence" admitted to rebut the State's case, and improperly eased the State's burden of proving the mens rea element beyond a reasonable doubt. *Id.* at 41, 51-55. A plurality of this Court ruled that Montana had not violated due process, recognizing that no fundamental principle of justice prohibits a State from precluding the admission of voluntary intoxication evidence. *Id.* at 44-56. The plurality noted that a State could exclude that evidence either by evidentiary rule or by substantively amending the mens rea element so that evidence of voluntary intoxication does not negate it. *Id.* at 50 n.4.

Justice Ginsburg, concurring in the plurality's judgment and providing the majority vote, agreed with the plurality only on the narrow ground that Montana had redefined the mens rea element of its criminal offenses so that voluntary intoxication evidence did not negate that element. *Id.* at 58 (Ginsburg, J., concurring). Justice Ginsburg noted that "States enjoy wide latitude in defining the elements of offenses, particularly when determining 'the extent to which moral culpability should be a prerequisite to conviction for a crime.'" *Id.* (quoting *Powell*, 392 U.S. at 545 [Black, J., concurring]) (internal citation omitted). Justice Ginsburg recognized that Montana had redefined mens rea to be determined based on objective facts and circumstances – rather than on the subjective state of mind – in cases in which the defendant was voluntarily intoxicated:

> Thus, in a prosecution for deliberate homicide, the State need not prove that the defendant purposely or knowingly cause[d] the death of another[] in a purely subjective sense. To obtain a conviction, the prosecution must prove only that

> (1) the defendant caused the death of another with actual knowledge or purpose, *or* (2) that the defendant killed under circumstances that would otherwise establish knowledge or purpose but for [the defendant's] voluntary intoxication.

*Id.* (internal citations and quotation marks omitted).

Two of the dissenting Justices agreed with the plurality and Justice Ginsburg that States could redefine mens rea elements to make the condition of voluntary intoxication irrelevant. Justice O'Connor stated that "[a] state legislature certainly possesses the authority to define the offenses it wishes to punish. If the Montana Legislature chose to redefine this offense so as to alter the requisite mental-state element, the due process problem presented in this case would not be at issue." *Id.* at 71 (O'Connor, J., dissenting). Justice Souter stated, "I have no doubt that a State may so define the mental element of an offense that evidence of a defendant's voluntary intoxication at the time of commission does not have exculpatory relevance and to that extent, may be excluded without raising any issue of due process." *Id.* at 73 (Souter, J., dissenting). Justices O'Connor and Souter did not agree, however, that Montana had in fact redefined the mens rea element to make voluntary intoxication irrelevant; the Montana Supreme Court found as a matter of state law that evidence of voluntary intoxication *was* relevant to the issue of mens rea, and they felt bound by the Montana Supreme Court's determination of state law. *Id.* at 71-72 (O'Connor, J., dissenting); *id.* at 73 (Souter, J., dissenting).

Under the analysis of the plurality and Justices Ginsburg, O'Connor, and Souter, Arizona's legislative decision to make mental disease or defect irrelevant to mens rea does not violate due process. Arizona has simply

"objectified" mens rea with regard to mental disease or defect. It has already done so regarding evidence of voluntary intoxication in Arizona Revised Statutes § 13-503, which does not violate due process under *Egelhoff*. Evidence of mental disease or defect is no different in this regard. Moreover, no one can disagree about what the state law is, as in *Egelhoff*, because the Arizona Supreme Court clearly held in *Mott* that evidence of mental disease or defect is *not* relevant to mens rea under Arizona law. 931 P.2d at 1050-51. Arizona's decision to make mental disease or defect irrelevant and nonexculpatory regarding mens rea is within its authority to define the elements of crimes and violates no fundamental principle of justice.

Clark contends that defining a mens rea so that evidence of mental disease or defect does not negate it violates due process because a person can be found guilty only if the State proves that he actually had the intent to commit the crime. (Petitioner's Opening Brief at 26-32.) Clark argues that the very circumstance that made him incapable of subjectively forming the requisite mens rea – his paranoid schizophrenia – is the very circumstance that Arizona has deemed irrelevant. But no principle of justice forbids States from defining mens rea in terms of objective facts and circumstances rather than subjective mental states. The States and the federal government often base criminal liability on whether a "reasonable person" would have known of a particular fact, circumstance, or consequence rather than on actual knowledge. *See United States v. Wurliger*, 981 F.2d 1497, 1504 (6th Cir. 1992) (collecting federal examples of criminal liability based on whether a defendant "had reason to know"); *State v. Lefevre*, 972 P.2d 1021, 1026 (Ariz. App. 1998) (collecting Arizona examples); *see also United States v. Galvan*, 407

F.3d 954, 957 (8th Cir. 2005) ("[W]e see no constitutional infirmity in the statute's visiting a criminal penalty on a person who had reasonable cause to believe" he had possessed methamphetamine.). In Clark's case, Arizona had to prove that Clark either (1) actually intended to kill Officer Moritz knowing that he was a police officer or (2) killed Officer Moritz under circumstances that would establish intent or knowledge but for his mental disease or defect. No fundamental principle of justice prevents Arizona from doing so.

Arizona has the authority to design its criminal justice system with a skeptical eye toward mental disease or defect evidence. This Court itself has repeatedly voiced its skepticism toward such evidence. *See Leland*, 342 U.S. at 801 ("The whole problem [of defining insanity] has evoked wide disagreement."); *id.* at 803 (Frankfurter, J., dissenting) ("Sanity and insanity are concepts of incertitude" "given varying and conflicting content at the same time and from time to time by specialists in the field."); *Greenwood*, 350 U.S. at 375 (The Court has repeatedly recognized the "uncertainty of diagnosis in this field and the tentativeness of professional judgment."); *Powell*, 392 U.S. at 536-37 (The Court should not establish a constitutional definition of insanity when the meaning of psychological terms, "let alone relevance, is not yet clear either to doctors or lawyers."). For this reason, this Court has given Congress wide discretion in matters psychological: "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974). States and the District of Columbia share this Court's skepticism and have precluded mental disease

or defect evidence to negate mens rea. *See Bethea v. United States*, 365 A.2d 64, 89 (D.C. App. 1976) ("[T]he degree of sophistication of the psychiatric sciences and the validity and reliability of its evidentiary product are not without dispute."); *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985) (declining to permit psychological evidence to negate mens rea based in part on the "constant advance and change" in the knowledge of medicine and psychiatry); *Steele v. State*, 294 N.W.2d 2, 12 (Wis. 1980) ("[T]here is substantial doubt in respect to the trustworthiness and reliability of psychiatric testimony.").

States have many other reasons for excluding mental disease or defect evidence that does not rise to the level of insanity. Some States have decided that it is too difficult to ask jurors not only to determine whether a defendant is insane but also to determine, if the defendant is not insane, whether and to what degree his mental illness nevertheless affected his ability to form mens rea: "The problem is difficult enough when evaluating the gross standard of insanity in terms of criminal responsibility. It is intolerable when attempting to determine specific intent." *Steele*, 294 N.W.2d at 13; *accord State v. Provost*, 490 N.W.2d 93, 100 (Minn. 1992); *State v. Wilcox*, 436 N.E.2d 523, 529 (Ohio 1982); *Stamper*, 324 S.E.2d at 688; *see also Wahrlich v. Arizona*, 479 F.2d 1137, 1138 (9th Cir. 1973) ("[T]he state of the developing art of psychiatry is such that we are not convinced the psychiatric testimony directed to a retrospective analysis of the subtle gradations of specific intent has enough probative value to compel its admission."). Allowing psychological evidence to be admitted to negate mens rea also creates the risk that a defendant, instead of being found guilty except insane or not guilty by reason of insanity and committed for

treatment, will be acquitted and set free. *See Bethea*, 365 A.2d at 90-91; *Wilcox*, 436 N.E.2d at 527. Additionally, allowing such evidence to negate mens rea "opens the courtroom doors to virtually unlimited psychiatric testimony." *Provost*, 490 N.W.2d at 100 (internal quotation marks and citation omitted). Further, a State may simply wish to protect the integrity of its bifurcated trial procedure, in which guilt is tried before the issue of insanity. *See Steele*, 294 N.W.2d at 8-12. States thus have a multitude of valid policy reasons to limit the relevance of psychological evidence on the issue of mens rea.[5]

States may rationally conclude that defendants who have mental illnesses that fall short of insanity are no less culpable than those who have no mental illness: "So little self-control and rationality are necessary to obey the law, that when all the elements of a prima facie case are present, the person should be held fully legally culpable." Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 32 (1984). States may rationally decide that subtle distinctions among those who are mentally ill but not insane do not affect culpability:

> [T]he common law, many years ago, fixed a stable and constant standard of mental competence as the criterion for criminal responsibility. A person whose mental state falls outside the borderline drawn by the standard is deemed legally insane. All persons inside that borderline are presumed

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[5] Some States, rather than prohibit the admission of mental disease or defect evidence altogether, limit its admission to crimes that have a "specific" – as opposed to a "general" – intent. *See Mill v. State*, 585 P.2d 546, 551 (Alaska 1979); *State v. Schouten*, 707 N.W.2d 820, 825 (S.D. 2005).

> sane and to possess a sufficient degree of reason to be responsible for [their] crimes.

*Stamper*, 324 S.E.2d at 688 (internal quotation marks and citation omitted). "Within the range of individuals who are not 'insane', the law does not recognize the readily demonstrable fact that as between individual criminal defendants the nature and development of their mental capabilities may vary greatly." *Bethea*, 365 A.2d at 87-88. Arizona has rationally concluded that defendants – like Clark – who do not have a mental disease or defect that makes them insane are criminally responsible for their crimes.

This does not mean, of course, that Arizona is indifferent to a defendant's mental disease or defect. Arizona provides for an insanity defense, and if a defendant is not insane but still possesses some mental disease or defect, Arizona mandates its consideration at sentencing as a mitigating circumstance. *See* Arizona Revised Statutes § 13-702(C)(2) (a trial court "shall consider" a defendant's mental disease or defect as a mitigating circumstance if "[t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was significantly impaired."). The trial court found Clark's mental illness to be a mitigating circumstance. (R.T. 10/2/03, at 72.) This satisfies any due process right Clark may have to require a State to consider mental illness in its criminal justice system. *See Foucha*, 504 U.S. at 90 (O'Connor, J., concurring) ("If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of [*Foucha*] erects no bar to implementing that judgment.").

Arizona has legislatively designed a criminal justice system that considers a defendant's mental illness for two purposes: (1) if the defendant's mental illness is such that he is insane as defined under Arizona law, the defendant is deemed not criminally responsible for his actions and is committed to the Arizona State Hospital; (2) if the defendant's mental illness does not render him insane as defined under Arizona law, the trial court must consider it as a mitigating circumstance for sentencing purposes. No principle of justice the Due Process Clause recognizes requires Arizona to consider Clark's mental illness to negate mens rea. Arizona therefore tried and convicted Clark in accordance with due process.

## CONCLUSION

For these reasons, Respondent requests that this Court affirm the judgment of the Arizona Court of Appeals.

Respectfully submitted,

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FILED
APR 10 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-5966

In The

# Supreme Court of the United States

ERIC MICHAEL CLARK,

*Petitioner,*

vs.

STATE OF ARIZONA,

*Respondent.*

**On Writ Of Certiorari To The Arizona Court Of Appeals**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Most of the points made in Arizona's brief and its *amici*'s were addressed in Eric's opening brief. This reply takes up only matters that were not.

### I. ERIC'S DUE PROCESS CLAIMS WERE UNMISTAKABLY PRESENTED TO THE COURTS BELOW, DECIDED ON THE MERITS, AND RAISED IN ERIC'S *CERTIORARI* PETITION.

#### A. The Question Whether the Trial Court Denied Eric Due Process by Refusing to Consider Evidence of his Mental Illness for the Purpose of Rebutting the Factual Inferences on Which the Prosecution Relied to Prove the *Mens Rea* Elements of the Crime Charged Was Raised and Decided on the Merits at Every Stage of this Case.

Point I in Eric's opening brief ("PB") argues that because the trial court in a bench trial refused to consider his evidence of mental illness for the purpose of rebutting the prosecution's factual proof of the *mens rea* elements of first-degree murder, Eric was denied federal due process. Arizona says this claim is not properly before the Court because it was resolved by the court below "on the state-law procedural ground of waiver." (Respondent's Brief ("RB") 12-13; *see id.* at 27-29.) It adds, with regard to one of Eric's subsidiary arguments in support of the claim (the argument at PB 13-21), that – "[t]o the extent that this is a separate argument" – "the argument was not 'pressed or passed upon' in the state appellate court or raised at the certiorari stage. . . . " (RB 26, n. 2.) The United States, as *amicus curiae*, does not share Arizona's doubts about whether the specific argument made by Eric at PB 13-21 *is* "a separate argument"; the United States declares it to be

such[1] and urges that it was not raised or decided below. (Brief for the United States. ("USB") 27-29.) The United States does not suggest that any other line of argument in Eric's Point I (PB 13-32) was not raised below, or that any part of the decision below rests on state procedural grounds.

None of the objections to this Court's consideration of Eric's Point I – or subpoint I(A) – has any substance. Eric's Point I is and always has been an attack on the rule of *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), which both courts below held applicable and binding. *Mott* announced a categorical "rejection of the use of psychological testimony to challenge the *mens rea* element of a crime," 187 Ariz. at 540, 930 P.2d at 1050, and upheld this rule against federal due process challenge, *id.* at 541-44, 931 P.2d 1051-54. Deeming himself bound by *Mott*, Eric's trial judge therefore refused to consider any of Eric's mental-illness evidence as bearing on the question of whether Eric did or did not have the mental states that are the *mens rea* elements of first-degree murder. (JA 8-9.) Deeming itself bound by *Mott*, the Arizona Court of Appeals held that this refusal did not violate federal due process. (JA 351-353.) Eric's subpoint I.A at PB 13-21 is *not* a "separate argument" from the federal Due Process contention which he pressed upon both courts below and which both courts rejected. It is simply a specific explication of the most obvious way in which the *Mott* rule

[1] It does this by the rhetorical device of inserting the word *independently* in the sentence "Petitioner contends that the trial court independently violated his due process rights because it refused to consider psychiatric evidence offered to rebut factual inferences drawn by the prosecution about his intent." (U.S. Br. 27-28.) It neither explains nor justifies the insertion.

violated his Due Process right to present a defense. Parties before this Court "are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899). They may refine the arguments they made below so long as the essence of their federal claim remains unchanged. *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983). "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). *See also, Stanley v. Illinois*, 405 U.S. 645, 658 n. 10 (1972) (this Court may "dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court," whether or not that exact analysis was argued below.)

In the present case, both courts and both parties below understood completely that (1) Eric was asserting a federal due process right to have his mental-illness evidence considered for the purpose of rebutting the prosecution's proof of the *mens rea* elements of first-degree murder; (2) the State, invoking *Mott*, insisted that the trial judge could not consider the evidence for that purpose; (3) the trial judge agreed with the State and declined to give any consideration to the mental-illness evidence in making his factual findings as to whether Eric did or did not act with the state of mind required for a first-degree murder conviction; and (4) Eric's federal constitutional challenge to this procedure was being rejected at trial and on appeal, upon the binding authority of *Mott*. We will document this briefly in the following pages. First, though, it is useful to

dispel a misconception that constitutes a mainstay of the efforts by Arizona and the United States to avoid this Court's decision of Eric's Due Process challenge to the *Mott* rule.

This is the notion that the failure of Eric's defense counsel to utilize an opportunity which the trial court gave them to make an "offer of proof" at the conclusion of the testimony – if they had additional evidence of mental illness relevant to *mens rea* which they had not adduced in connection with Eric's defense of Guilty Except Insane ("GEI") – has something to do with Eric's right to complain on appeal that the mental-illness evidence which they *did* adduce as going to both *mens rea* and GEI was wrongly limited by the trial court to use for the latter purpose only. (*See* RB 27-29; USB 27-29.)[2] An *offer of proof* would have

[2] Arizona's version of this misconception is to say that the Court of Appeals below "noted that the trial court had not prevented Eric from presenting psychological evidence, despite *Mott*'s holding to the contrary, and had invited him to make an offer of proof regarding the evidence's relevance to his mental state." (RB 27-28.) "Consequently, Clark had the duty – and the trial court gave him the opportunity – to show the relevance of his mental disease or defect evidence to whether he knew he was killing a police officer" (RB 28); and, "[b]y failing to draw any connection between his evidence and the fact he wanted to prove, Clark waived this claim on appeal." (RB 28-29.) These passages seriously misrepresent what happened in the trial court by subtly misstating what the Court of Appeals said about it. What actually happened in the trial court is described at PB 8-9 and documented in footnote 19 thereto. Succinctly: (1) the trial judge ruled that *Mott* precluded his consideration of any mental-illness evidence for the purpose of determining whether Eric had the *mens rea* requisite for first-degree murder; (2) the trial court observed that most or all of the evidence that it could not consider for this purpose was nevertheless admissible as relevant to the issue of GEI, (3) the trial court noted that because the case was being tried without a jury, there was no risk that evidence properly admitted on the GEI issue would be used improperly as going to the *mens rea* issues; so (4) the trial court held that (a) it

(Continued on following page)

been necessary – and counsel's failure to make one would be relevant – if Eric's claim in the Court of Appeals below and in this Court were that the trial court erred in *excluding evidence*. But that is not his claim. His claim is that the trial court erred in refusing to *consider*, as bearing on the factual issues of *mens rea*, the evidence of Eric's mental illness *which is in the record* but which the trial

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would admit any and all mental-illness evidence that Eric presented which was relevant to GEI; (b) the trial court itself would consider that evidence only on the issue of GEI; (c) the admitted evidence would also serve as the record basis for any challenge to *Mott* that Eric might make on appeal; and (d) if Eric wished to make a record of any additional evidence – evidence which Eric contended was relevant to *mens rea* but not to GEI – Eric could do so by an offer of proof at the conclusion of the trial. This was the "offer of proof" to which the Court of Appeals was referring when it said that "the trial court did not prevent Clark from presenting . . . evidence [of mental illness], despite our supreme court's decision to the contrary in *Mott*, even going so far as to permit him to make an offer of proof on the issue at the close of the evidence." (JA 351-352.) It was not an "offer of proof" regarding the evidence which the trial court had *admitted*, still less "an offer of proof *regarding the evidence's relevance to his mental state*." (RB 28) (emphasis added).

The United States similarly misdescribes the trial court's invitation to make "an offer of proof" of additional evidence as though it were a demand that Eric present "argument to the trial court" about the specific ways in which *admitted* evidence rebutted the prosecution's proof of *mens rea*. To talk about an "offer of proof" in connection with evidence which has been admitted and is in the record is an oxymoron. And to demand that Eric's counsel argue to the trial court exactly how Eric's mental illness refuted the prosecution's proof of *mens rea* after the trial court had explicitly ruled that "I'm bound by the supreme court decision in *Mott* and we will be focusing, as far as I'm concerned, strictly on the insanity defense" (JA 9), is to ask them to play the part of moron *simpliciter*.

court had ruled it would consider solely on the issue of GEI.[3]

Eric's counsel did everything necessary and proper to preserve *that* claim. Beginning before trial and continuing through their petition for *certiorari*, they consistently argued that the *Mott* rule violated Eric's right to federal due process because it precluded *consideration* of evidence of his mental illness to *rebut* the State's evidence that he intentionally and knowingly killed a police officer. In a pretrial memorandum regarding the issues likely to arise at trial, they took the position that "even if this court as the fact finder decides to reject Eric's affirmative defense and finds he was legally sane at the time of the offense, he is free to argue and the court is free to find that Eric is guilty of a less serious form of homicide because the State has failed to prove the requisite mental state." (ROA-362 at 5.) Again in opening argument, they asserted that if Eric "did not know that Officer Moritz was, in fact, a police officer but was acting under delusional or otherwise nonintentional thinking at that time, then he is not guilty of first degree murder." (RT 8/5/03 at 18.) Yet again, after

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[3] The sole passage in the Court of Appeals' opinion to which Arizona points as purportedly showing that that court's decision rested on a state-law ground is: "aside from the evidence to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer." (JA 352; *see* RB 28.) This passage does not *decline* to reach the merits of Eric's federal claim; to the contrary, it *defines* the federal claim which the Court of Appeals decided on the merits. It says that the only evidence Eric contended on appeal was refused consideration under *Mott* in violation of the federal Constitution was the evidence that defense counsel was permitted to introduce and did introduce at trial, both as proof of GEI and as a record basis for his attack on *Mott*. (*See* the preceding footnote, para. 1). And that is the same evidence on which Eric's Point I – and subpoint I(A) – relies in this Court.

moving for a directed verdict of not guilty of first degree murder, counsel "reserve[d] the right to reurge this motion at the completion of the defense case based on the evidence you hear on whether there is sufficient evidence that Eric Clark in his state of mind at that moment knew that this was a police officer and intended to kill a police officer." (JA 5.) The motion was, indeed, renewed at the completion of all the evidence, based on the defense arguments "made previously but now in consideration of all of the evidence that's been presented" (RT 8/27/03 at 4) – evidence directed exclusively to showing that Eric suffered from chronic paranoid schizophrenia and was actively psychotic and delusional at the time of the killing (*see* RT 8/12/03 at 4 through RT 8/27/03 at 4) – and the motion was again denied (RT 8/27/03 at 5). With full awareness that this was Eric's position, the trial court held that it was bound by *Mott* to limit its consideration of the mental-illness evidence to the issue of GEI and not consider it for the purpose of rebutting the State's factual evidence of *mens rea*. (JA 9.)[4]

In Eric's post-trial Motion to Vacate Judgment and Sentence, he argued that "[t]he court's failure to consider whether as a result of Eric's mental illness he was unable to form the *mens rea* necessary to commit an intentional or

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[4] The State was also fully aware that Eric was offering his evidence of mental illness to *rebut* its proof of *mens rea* and was claiming a federal constitutional right to have the evidence considered for this purpose. In its pretrial memorandum regarding the psychiatric issues in the case, the State explicitly asserted that "defendant is attempting to present evidence of his purported delusions *to negate the mental state of intending or knowing* . . . " (ROA-376 at 3) (emphasis added); it consequently cited *Mott* as holding both that this "is not permissible under Arizona law" and that "the federal Constitution was not [thereby] violated." *Id*.

knowing murder *deprived him of his fundamental right to contest the state's case*" in violation of the federal Due Process Clause. (ROA-406 at 1) (emphasis added). Similarly, in his Opening Brief in the Arizona Court of Appeals, he argued that the trial court's refusal to consider his factual evidence on the issue of whether the State had proved he intentionally or knowingly killed a police officer violated his due process right to "present a defense" to the State's case.[5] (ROA-Opening Brief at 47-48.) In his Reply Brief, Eric again argued that the trial court's refusal to consider this evidence prevented him from exercising his right *"to defend himself against the State's criminal charges*" and to contend that *"the State ha[d] failed to prove the requisite mens rea."* (ROA-Reply Brief at 13-15) (emphasis added). The Arizona Court of Appeals understood that the issues thus raised were whether "the trial court erred in refusing to consider evidence of . . . [Eric's] mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder" (JA 351), and whether that refusal violated his "fundamental right to present a defense" to the State's case (JA 348). The court rejected his federal claim on the merits on the ground that *Mott* was binding. (JA 347-53.)

Finally, Eric's *certiorari* petition in this Court asserted repeatedly that his due process rights were violated because the trial court had refused to *consider* his evidence of mental illness "as *rebuttal evidence*" to the State's case. Eric urged this Court to grant review because no

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[5] Eric specifically pointed out that "the majority view recognizes that prohibiting evidence of mental illness short of legal insanity to *rebut the State's evidence of mens rea* violates . . . due process." (ROA-Opening Br. at 51) (citing case law) (emphasis added).

precedent addressed whether precluding consideration of "factual evidence regarding an *involuntary* mental illness *to rebut the government's evidence* or negate *mens rea* violates due process." (Pet. for Cert. 25, 27; *see also id.* at 30) (emphasis added).

### B. In any Event, the Objections to this Court's Consideration of Eric's Claims are Legally Inconsequential.

The preceding section demonstrates that each of the objections raised by Arizona and the United States to this Court's consideration of Eric's Point I and subpoint I.A are factually far wide of the mark. They are also baseless for two purely legal reasons:

1. Both courts below indisputably decided Eric's federal due process challenges to the *Mott* rule on the merits. This is plain because they both held *Mott* controlling, not only with regard to the Arizona rule governing Eric's mental-illness evidence but also with regard to the federal constitutionality of that rule. And *Mott* is strictly a merits decision.[6] For that reason alone, Eric's federal due process contentions are properly before this Court, pursuant to "the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court

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[6] *Mott's* holding expressly rests upon the Arizona's Supreme Court's interpretation of federal due process. *See, e.g.*, 187 Ariz. at 541; 931 P.2d at 1051 ("Thus, *Fisher* [*v. United States*, 328 U.S. 463 (1946)] stands for the proposition that state legislatures, without violating the constitution, may preclude defendants from offering evidence of mental and psychological deficiencies to challenge the elements of a crime.") (*see also, id.* at 541-45, 931 P.2d at 1051-55 (citing and discussing, *Montana v. Egelhoff*, 518 U.S. 37 (1996); *Paterson v. New York*, 432 U.S. 197 (1977); and *Fisher*).

below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). *See also, e.g., State ex rel. Anderson v. Brand*, 303 U.S. 95, 98-99 (1938); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-86 (1945); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979), and cases cited; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313 n. 8 (1987); *Quinn v. Millsap*, 491 U.S. 95, 101-02 (1989); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

2. Question Presented number (2) in Eric's petition for *certiorari* in this Court reads: "Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment." Every argument advanced in Point I of Eric's opening brief is "fairly included" within this Question Presented under Rule 10 ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein"). Q.E.D.

## II. NEITHER PRECEDENT NOR REASON SUPPORTS *MOTT*'S RULE PRECLUDING CONSIDERATION OF EVIDENCE OF MENTAL ILLNESS TO REBUT *MENS REA* ELEMENTS OF A CRIME.

Arizona and the United States argue that this Court upheld procedures which precluded the consideration of mental-illness evidence offered to show that a criminal defendant lacked *mens rea* in *Fisher v. United States*, 328 U.S. 463 (1946), *Troche v. California*, 280 U.S. 254 (1929), and *Coleman v. California*, 317 U.S. 596 (1942). (RB 31-34;

USB 18-21.) As Eric's opening brief points out, no such procedure was upheld – or involved – in *Fisher*: Fisher's jury was in fact permitted to consider his evidence of mental illness as negating the *mens rea* of first-degree murder – exactly as Eric contends that his trial judge should have done. (*See* PB 25-26 & n. 31.) Nor do the summary rulings in *Troche* and *Coleman* control Eric's due process claim. This is so for several reasons.

*First*, these 1929 and 1942 cases long predate this Court's doctrinal development of the due process right to present a defense, in *Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973), and their progeny. According to *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), summary dismissals for want of a substantial federal question should be deemed controlling "'except when doctrinal developments indicate otherwise'" and "'until such time as the Court informs . . . [the lower courts] that (they) are not.'" *Second*, summary dispositions "do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 306-07 (1998) (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 477 n. 20 (1979)). *See also, e.g., Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Connecticut v. Doehr*, 501 U.S. 1, 12 n. 4 (1991).[7] *Third*, the California procedure at issue in

[7] If, as the United States argues, "*Fisher* was virtually foreordained by the summary disposition almost twenty years earlier in *Troche*" (USB 20), it is puzzling that the *Fisher* opinion nowhere cites that disposition (although the California state-court decision in *Troche* is among the numerous state cases that the *Fisher* opinion describes as "collected" in the Government's brief on both sides of the question whether juries should be instructed that mental illness not amounting

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*Troche* and *Coleman* did not, as Arizona's current *Mott* rule and GEI definition do, *both* preclude consideration of evidence of mental illness to rebut the prosecution's proof of mental states that are elements of a criminal charge *and* restrict the insanity defense to a sterile right/wrong inquiry that is narrower than the traditional Anglo-American standard reflected in *M'Naghten*.[8] (*See* PB 47-49.)[9]

Arizona and its amici also strain futilely to bring the *Mott* rule within the shelter of *Montana v. Egelhoff*, 518 U.S. 37 (1996), by characterizing *Mott* as a substantive decision that "define[s] the element of mens rea in such a way that evidence of a defendant's mental disease or defect does not negate it." (RB 30; *see id.* at 35-40; *and see*

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to insanity should be considered as bearing on the degree of murder, 328 U.S. at 473 n. 12).

[8] *M'Naghten's Case*, The House of Lords, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843). Under California law at the time of *Troche*, a criminal defendant was to be found sane "[i]f he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment," and "if he understands the nature and character of his action and its consequences, – if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong." *People v. Troche*, 206 Cal. 35, 46, 273 P. 767, 772 (1928). That standard remained unchanged at the time of *Coleman*. *See People v. Skinner*, 39 Cal.3d 765, 768, 704 P.2d 752, 753 (1985).

[9] "A summary disposition affirms only the judgment of the court below, and no more may be read into . . . [the Court's] action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 786 n. 5 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979). Such decisions "cannot be taken as adopting the reasoning of the lower courts." *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214, 224 n. 2 (1992). Summary dispositions are a " 'rather slender reed' on which to rest future decisions." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 203, n. 21 (1996) (quoting *Anderson, supra.*).

Brief of the States of Massachusetts, *et al.* ("MB") 21-22; USB 17 (*Mott*'s construction of Arizona GEI law produces the result that "in a prosecution for first-degree murder, the State does not have to prove that the defendant 'intend[ed] or kn[ew] that his conduct w[ould] cause death to a law enforcement officer' in a purely subjective sense")). With utmost respect, this is utter nonsense. If the State did not have to prove that Eric intended to cause the death of a police officer when he shot Officer Moritz, why did the prosecutor argue vigorously that Eric had this intent (*see, e.g.*, RT 8/5/03 at 15; RT 8/8 at 77-78) and rely on elaborate inferential reasoning – based on an "ambush" theory (*see* PB 14 & n. 21) and on statements purportedly made by Eric prior to the crime showing anti-police *animus* (*see* PB 14-15 & n. 22) – to prove that intent? Why did the State argue on appeal that there was sufficient "PROBATIVE EVIDENCE TO ESTABLISH THAT APPELLANT INTENTIONALLY OR KNOWINGLY KILLED A POLICE OFFICER"?[10] Why did the Court of Appeals, in rejecting Eric's contention that there was insufficient evidence to support his conviction of first-degree murder, find it necessary to make the explicit finding that there was "sufficient evidence to support the inference that

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[10] (ROA – Appellee's Answering Brief at 7. *See, e.g., id.* at 8) ("The evidence at trial established that Appellant intentionally lured a police officer into an ambush with the purpose of killing that officer. This included evidence that: (1) Appellant had antipathy toward the police prior to the killing; (2) Appellant told others that he would like to kill police officers shortly before he shot officer Moritz; (3) Appellant disturbed the residents of his neighborhood in a manner that would attract the police . . . [etc.]"); (*id.* at 12) ("There was overwhelming evidence that Appellant, not only knowingly killed a police officer, but that he intentionally did so. Accordingly, Appellant's sufficiency argument is meritless"); and *passim*.

Clark intentionally or knowingly shot Moritz"?[11] And what does it mean to say that a "defendant 'intend[ed] or kn[ew] that his conduct w[ould] cause death to a law enforcement officer"[12] in a . . . [*non*-]subjective sense" (USB 17)? Not a single concept in the history of epistemology, ontology, or metaphysics explains how there could be such a thing as non-subjective "intending" and "knowing."[13]

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[11] (JA 343. *See* PB 15-16 & n. 24. *See also, e.g.*, JA 343) ("The trial court was entitled to infer from Clark's use of the weapon that *he* intended or knew that *he* would kill Moritz"); (*id.* at 344) ("Furthermore, there is sufficient evidence to support the inference that *Clark* knew that Moritz was a police officer when he shot him.") (emphasis added).

[12] ARS § 13-1105(A)(3), under which Eric was charged, defines first-degree murder as killing an on-duty law enforcement officer, "[i]ntending or knowing that the . . . conduct will cause death to a law enforcement officer." (*See* PB 1.)

[13] That serious criminal liability in Arizona is in fact reserved for persons who act with subjective intention or awareness of the criminal dimension of their conduct is all the more obvious from Arizona's adoption of the Model Penal Code definitions of culpable mental states which require proof that "a person's objective is to cause . . . [a] result or to engage in . . . [specific] conduct" or that "a person is aware that his or her conduct is" as prescribed by law. ARS §§ 13-105(9)(a), (b). The cases cited at RB 39-40, upholding criminal liability when a defendant had "reason to know" but no actual knowledge involved statutes specifically including reason to know as a punishable *mens rea*. *E.g., United States v. Wurliger*, 981 F.2d 1497, 1504 (6th Cir. 1992) (statute punished a person who intercepted information "knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation"); *State v. LeFevre*, 193 Ariz. 385, 972 P.2d 1021, 1026 (Ariz. App. 1998) (statute punished a person who acquired funds "knowing or having reason to know that they are the proceeds of an offense"). They did not, of course, involve a charge of intentional murder that requires proof of a specific intent which renders this evidence highly relevant. As stated in the leading modern case on this issue, *United States v. Brawner*, 471 F.2d 969, 998-99 (D.C. Cir. 1972): "[When an offense] requires specific intent that cannot be satisfied merely by showing that defendant failed to

(Continued on following page)

Finally, Arizona and its *amici* argue that there are good policy reasons for Arizona to preclude consideration of evidence of mental illness as bearing on the issues of intent and knowledge that constitute the *mens rea* elements of serious crimes like first degree murder. These reasons boil down to skepticism that mental-health professionals can ascertain much about the workings of the mind or that juries can understand much of what mental-health professionals report on the subject. (*See* RB 40-43; USB 24-27; MB 24-28.)[14] Again, the arguments strain credulity as a justification for Arizona's procedure of reducing all mental-illness inquiries to the single question whether a defendant "was afflicted with a mental disease or defect of such severity that . . . [s/he] did not know the criminal act was wrong." ARS § 13-502(A). Can any serious supposition possibly be entertained that psychiatrists or juries are less able to determine (A) whether a defendant was so mentally ill that s/he could not form an intent to kill an individual knowing that the individual was a police officer

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conform to an objective standard [] the stated condition of defendant's mind [] is [] a proper subject for consideration, inquiry, and determination by the jury.'") (quoting *Bishop v. United States*, 107 F.2d 297, 301 (D.C. Cir. 1939)).

[14] The United States also suggests that the prohibition is justified since permitting consideration of this evidence presents too high of a risk of erroneous acquittals. (USB at 24.) Eric was not urging, however, that the factfinder find that he was not guilty of any crime as a result of his mental illness but merely that the State had not proven him guilty of the greater crime of first degree murder and he was guilty of a lesser form of homicide. *Cf. Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975) ("criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . . "). Moreover, Arizona, like most states provides for civil commitments following acquittals of mentally ill offenders who are a danger to themselves or others. *See* Title 36, ARS. *See also Foucha v. Louisiana*, 504 U.S. 71 (1992); *Jones v. United States*, 463 U.S. 354 (1983).

than (B) whether s/he was so mentally ill that s/he did not know the criminal act was wrong?[15]

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[16] Several additional points should be noted, although the one made in text is sufficient to demonstrate the incoherence of the purported psychiatric-skepticism justification for the *Mott* rule. *First*, by statute and case law, Arizona treats psychiatric and psychological evidence as relevant and reliable not only on the issue of sanity, *see State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637 (Ariz. 1983), but on numerous other issues. *E.g., State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (Ariz. 1986) (psychological characteristics of molestation victims); *State v. Hamilton*, 177 Ariz. 403, 868 P.2d 986 (Ariz. App. 1993) (psychological evidence of child abuse accommodation syndrome); *Horan v. Industrial Comm'n*, 167 Ariz. 322, 806 P.2d 911 (Ariz. App. 1991) (psychiatric testimony regarding neurological deficits). *See also* Rule 11.3, *Arizona Rules of Criminal Procedure* (competency); ARS § 36-3703 (sexually violent persons); ARS, Title 36 (civil commitment); ARS § 13-502 (insanity). *See also, State v. Christensen*, 129 Ariz. 32, 35-36, 628 P.2d 580 (Ariz. 1981) (psychiatric testimony regarding defendant's character trait for impulsivity is admissible in a trial for first degree murder to rebut the state evidence of premeditation). *Second*, Arizona trial judges, like their peers elsewhere, have ample power to shield juries from evidence that is genuinely likely to be unduly confusing or more prejudicial than probative, by conducting the individualized inquiry authorized by Rules 403 and 702 of the *Arizona Rules of Evidence* (which are like the same-numbered Federal Rules). But a *categorical* exclusion of mental-illness evidence on the ground of its supposed unreliability would fare no better constitutionally than the similarly-explained categorical exclusions in *Chambers v. Mississippi, supra*, and in *Rock v. Arkansas*, 483 U.S. 44 (1987). And, *third*, the arbitrariness and overbreadth of such an exclusion would be particularly indefensible in a case like Eric's, involving a mental disorder so florid and obvious even to commonplace observation that it was proved – to the satisfaction of the prosecution and its expert as well as to the satisfaction of the trial judge – as much by lay observations of Eric's bizarre behavior as by expert psychiatric and psychological testimony.

## III. ARIZONA'S DEFINITION OF INSANITY, PUNISHING MENTALLY ILL PEOPLE WHO DO NOT KNOW WHAT THEY ARE DOING, CANNOT BE SAVED FROM CONSTITUTIONAL INVALIDATION ON THE THEORY THAT ITS NARROW RIGHT-WRONG STANDARD SUBSUMES AN INQUIRY WHETHER THE DEFENDANT APPRECIATED THE NATURE AND CHARACTER OF HIS OR HER ACT.

Arizona's definition of insanity punishes people if they do an act they know is wrong, even though their mental illness prevents them from being aware that they are doing that act. *See* ARS § 13-502(A) (PB 2). Eric contends that this procedure violates due process because it disregards a nexus between personal moral culpability and criminal stigmatization that was recognized as essential long before the Constitution – a nexus classically expressed in the *M'Naghten* rule. Arizona and the United States seek to deflect this due process challenge by asserting that the right-wrong standard prescribed by ARS § 13-502(A) subsumes an inquiry as to whether the defendant knew the nature and character of the act s/he did. They support this diversion by pointing to the observation of the Court of Appeals below that "[i]t is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (JA 350; *see* RB 24-25; USB 14-16.)

It is important to note that in this passage the Court of Appeals does not purport to *construe* ARS § 13-502(A) as requiring knowledge of the nature of one's act as a component part of knowledge that the act is wrong. It could easily have done this but did not. Instead, it made the

logical point that as a matter of *fact* it failed to see how a defendant could know that his or her act was wrong without knowing what it was that s/he was doing.

On this record, that failure is singularly shortsighted. A major feature of Eric's schizophrenic delusional structure was the belief that the Earth had been invaded by aliens, that the population of Flagstaff was aliens, and that these aliens were trying to capture Eric and kill him. (*See* PB 4-6 and particularly the references in note 13.) Consistent with these delusions, Eric might well have understood that killing a human police officer was wrong but believed that Officer Moritz was an alien who had assumed the form of an officer in order to do Eric harm with impunity. (*See* ROA-Reply Brief at 17, making precisely this point.) In such a scenario – which the trial court could have found fully supported by the record if it had believed that the finding would render Eric GEI under ARS § 13-502(A), Eric's knowledge of the wrongness of killing a human police office would *not* have subsumed an awareness that that was what he was doing.

In any event, if this Court were to read the Court of Appeals' opinion as suggesting the possibility that ARS § 13-502(A) could be construed as Arizona and the United States now argue that it should be construed, the proper course of action regarding this aspect of the case would be a remand to the Court of Appeals to determine in the first instance whether the statute *is* to be so construed; and, if so, for a further remand to the trial court for factfinding under that construction of the statute. The trial judge's factual rejection of Eric's GEI defense could not fairly be salvaged by interpreting the statute *post hoc* to avoid Eric's constitutional challenge to it by giving it a meaning that did not guide the trial judge when he made the

factual findings which produced that rejection. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153-55 (1969); *cf. Cole v. Arkansas*, 333 U.S. 196 (1948).

## CONCLUSION

Eric Clark's conviction should be reversed.

RESPECTFULLY SUBMITTED this 10th day of April, 2006

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

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## CLARK *v.* ARIZONA

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 05–5966. Argued April 19, 2006—Decided June 29, 2006

Petitioner Clark was charged with first-degree murder under an Arizona statute prohibiting "[i]nten[tionally] or knowing[ly]" killing a police officer in the line of duty. At his bench trial, Clark did not contest that he shot the officer or that the officer died, but relied on his own undisputed paranoid schizophrenia at the time of the incident to deny that he had the specific intent to shoot an officer or knowledge that he was doing so. Accordingly, the prosecutor offered circumstantial evidence that Clark knew the victim was a police officer and testimony indicating that Clark had previously stated he wanted to shoot police and had lured the victim to the scene to kill him. In presenting the defense case, Clark claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence that, in the words of another state statute, "at the time of the [crime, he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." Second, he aimed to rebut the prosecution's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly to kill an officer.

Ruling that Clark could not rely on evidence bearing on insanity to dispute the *mens rea*, the trial court cited the Arizona Supreme Court's decision in *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046, which refused to allow psychiatric testimony to negate specific intent and held that Arizona does not allow evidence of a mental disorder short of insanity to negate the *mens rea* element of a crime. As to his insanity, then, Clark presented lay testimony describing his increasingly bizarre behavior over the year before the shooting. Other lay and expert testimony indicated, among other things, that Clark thought that "aliens" (some impersonating government agents) were

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trying to kill him and that bullets were the only way to stop them. A psychiatrist testified that Clark was suffering from paranoid schizophrenia with delusions about "aliens" when he killed the officer, and concluded that Clark was incapable of luring the officer or understanding right from wrong and was thus insane at the time of the killing. In rebuttal, the State's psychiatrist gave his opinion that Clark's paranoid schizophrenia did not keep him from appreciating the wrongfulness of his conduct before and after the shooting. The judge then issued a first-degree murder verdict, finding that in light of that the facts of the crime, the expert evaluations, Clark's actions and behavior both before and after the shooting, and the observations of those who knew him, Clark had not established that his schizophrenia distorted his perception of reality so severely that he did not know his actions were wrong.

Clark moved to vacate the judgment and life sentence, arguing, among other things, that Arizona's insanity test and its *Mott* rule each violate due process. He claimed that the Arizona Legislature had impermissibly narrowed its insanity standard in 1993 when it eliminated the first of the two parts of the traditional *M'Naghten* insanity test. The trial court denied the motion. Affirming, the Arizona Court of Appeals held, among other things, that the State's insanity scheme was consistent with due process. The court read *Mott* as barring the trial court's consideration of evidence of Clark's mental illness and capacity directly on the element of *mens rea*.

*Held:*

1. Due process does not prohibit Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong. Pp. 6–15.

(a) The first part of the landmark English rule in *M'Naghten's Case* asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he was doing. The second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action was wrong. Although the Arizona Legislature at first adopted the full *M'Naghten* statement, it later dropped the cognitive incapacity part. Under current Arizona law, a defendant will not be adjudged insane unless he demonstrates that at the time of the crime, he was afflicted with a mental disease or defect of such severity that he did not know the criminal act was wrong. Pp. 6–7.

(b) Clark insists that the side-by-side *M'Naghten* test represents the minimum that a government must provide, and he argues that eliminating the first part " 'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as funda-

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mental.'" *Patterson* v. *New York*, 432 U. S. 197, 202. The claim entails no light burden, and Clark does not carry it. History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses. See, *e.g.*, *Patterson*, *supra*, at 210. Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with four traditional strains variously combined to yield a diversity of American standards. Although 17 States and the Federal Government have adopted recognizable versions of the *M'Naghten* test with both its components, other States have adopted a variety of standards based on all or part of one or more of four variants. The alternatives are multiplied further by variations in the prescribed insanity verdict. This varied background makes clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Pp. 7–12.

(c) Nor does Arizona's abbreviation of the *M'Naghten* statement raise a proper claim that some constitutional minimum has been shortchanged. Although Arizona's former statement of the full *M'Naghten* rule was constitutionally adequate, the abbreviated rule is no less so, for cognitive incapacity is relevant under that statement, just as it was under the more extended formulation, and evidence going to cognitive incapacity has the same significance under the short form as it had under the long. Though Clark is correct that applying the moral incapacity test (telling right from wrong) does not necessarily require evaluation of a defendant's cognitive capacity to appreciate the nature and quality of the acts charged against him, his argument fails to recognize that cognitive incapacity is itself enough to demonstrate moral incapacity, so that evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible. In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime. The Arizona appeals court acknowledged as much in this case. Clark adopted this very analysis in the trial court, which apparently agreed when it admitted his cognitive incapacity evidence for consideration under the State's moral incapacity formulation. Clark can point to no evidence bearing on insanity that was excluded. Pp. 12–15.

2. The Arizona Supreme Court's *Mott* rule does not violate due process. Pp. 15–38.

(a) *Mott* held that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its

bearing on an insanity defense, but could not be considered on the element of *mens rea*. Of the three categories of evidence that potentially bear on *mens rea*—(1) everyday "observation evidence" either by lay or expert witnesses of what Clark did or said, which may support the professional diagnoses of disease and in any event is the kind of evidence that can be relevant to show what was on Clark's mind when he fired his gun; (2) "mental-disease evidence," typically from professional psychologists or psychiatrists based on factual reports, professional observations, and tests about Clark's mental disease, with features described by the witness; and (3) "capacity evidence," typically by the same experts, about Clark's capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*)—*Mott* imposed no restriction on considering evidence of the first sort, but applies to the latter two. Although the trial court seems to have applied the *Mott* restriction to all three categories of evidence Clark offered for the purpose of showing what he called his inability to form the required *mens rea*, his objection to *Mott*'s application does not turn on the distinction between lay and expert witnesses or the kinds of testimony they were competent to present. Rather, the issue here is Clark's claim that the *Mott* rule violates due process. Pp. 15–25.

(b) Clark's *Mott* challenge turns on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him. Pp. 25–30.

(i) The presumption of innocence is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense changed, including the mental element or *mens rea*. The modern tendency is to describe the *mens rea* required to prove particular offenses in specific terms, as shown in the Arizona statute requiring the State to prove that in acting to kill the victim, Clark intended to kill a law enforcement officer on duty or knew that the victim was such an officer on duty. As applied to *mens rea* (and every other element), the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt that a defendant's state of mind was in fact what the charge states. See *In re Winship*, 397 U. S. 358, 361–363. Pp. 25–26.

(ii) The presumption of sanity dispenses with a requirement that the government include as an element of every criminal charge an allegation that the defendant had the capacity to form the *mens rea* necessary for conviction and criminal responsibility. Unlike the presumption of innocence, the presumption of sanity's force varies

across the many state and federal jurisdictions, and prior law has recognized considerable leeway on the part of the legislative branch in defining the presumption's strength through the kind of evidence and degree of persuasiveness necessary to overcome it, see *Fisher* v. *United States*, 328 U. S. 463, 466–476. There are two points where the sanity or capacity presumption may be placed in issue. First, a State may allow a defendant to introduce (and a factfinder to consider) evidence of mental disease or incapacity for the bearing it can have on the government's burden to show *mens rea*. Second, the sanity presumption's force may be tested in the consideration of an insanity defense raised by a defendant. Insanity rules like *M'Naghten* and the variants noted above are attempts to define or indicate the kinds of mental differences that overcome the presumption of sanity or capacity and therefore excuse a defendant from customary criminal responsibility, see, *e.g.*, *Jones* v. *United States*, 463 U. S. 354, 373, n. 4, even if the prosecution has otherwise overcome the presumption of innocence by convincing the factfinder of all the elements charged beyond a reasonable doubt. The burden a defendant raising the insanity issue must carry defines the strength of the sanity presumption. A State may, for example, place the burden of persuasion on a defendant to prove insanity as the applicable law defines it, whether by a preponderance of the evidence or to some more convincing degree. See, *e.g.*, *Leland* v. *Oregon*, 343 U. S. 790, 798. Pp. 26–29.

(iii) A defendant has a due process right to present evidence favorable to himself on an element that must be proven to convict him. Evidence tending to show that a defendant suffers from mental disease and lacks capacity to form *mens rea* is relevant to rebut evidence that he did in fact form the required *mens rea* at the time in question. Thus, Clark claims a right to require the factfinder in this case to consider testimony about his mental illness and his incapacity directly, when weighing the persuasiveness of other evidence tending to show *mens rea*, which the prosecution has the burden to prove. However, the right to introduce relevant evidence can be curtailed if there is a good reason for doing so. For example, trial judges may "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U. S. ___, ___. And if evidence may be kept out entirely, its consideration may be subject to limitation, which Arizona claims the power to impose here. Under state law, mental-disease and capacity evidence may be considered only for its bearing on the insanity defense, and it will avail a defendant only if it is persuasive enough to satisfy the defendant's burden as defined by the terms of that defense. Such evidence is thus being channeled or restricted to one issue; it is not being excluded en-

tirely, and the question is whether reasons for requiring it to be channeled and restricted satisfy due process's fundamental fairness standard. Pp. 29–30.

(c) The reasons supporting the Arizona rule satisfy due process. Pp. 30–38.

(i) The first such reason is Arizona's authority to define its presumption of sanity (or capacity or responsibility) by choosing an insanity definition and placing the burden of persuasion on criminal defendants claiming incapacity as an excuse. Consistent with due process, a State can require defendants to bear that burden, see *Leland, supra*, at 797–799, and Clark does not object to Arizona's decision to require persuasion to a clear and convincing degree before the presumption of sanity and normal responsibility is overcome. If a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the sanity presumption more easily when addressing a different issue during the criminal trial. Yet just such an opportunity would be available if expert testimony of mental disease and incapacity could be considered for whatever a factfinder might think it was worth on the *mens rea* issue. The sanity presumption would then be only as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about *mens rea*; once reasonable doubt was found, acquittal would be required, and the standards established for the insanity defense would go by the boards. What counts for due process is simply that a State wishing to avoid a second avenue for exploring capacity, less stringent for a defendant, has a good reason for confining the consideration of mental disease and incapacity evidence to the insanity defense. Pp. 30–32.

(ii) Arizona's rule also serves to avoid confusion and misunderstanding on the part of jurors. The controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to capacity evidence than experts claim for it give rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Arizona, a defendant has the burden of persuasion. First, the diagnosis may mask vigorous debate within the psychiatric profession about the very contours of the mental disease itself. See, *e.g., Jones, supra*, at 364–365, n. 13. Though mental-disease evidence is certainly not condemned wholesale, the consequence of this professional ferment is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct. Next, there is the potential of mental-disease evidence to mislead jurors (when they are the factfinders) through the power of this kind of evidence to suggest that a defendant suffer-

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ing from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all. Even when a category of mental disease is broadly accepted and the assignment of a defendant's behavior to that category is uncontroversial, the classification may suggest something very significant about a defendant's capacity, when in fact the classification tells little or nothing about the defendant's ability to form *mens rea* or to exercise the cognitive, moral, or volitional capacities that define legal sanity. The limits of the utility of a professional disease diagnosis are evident in the dispute between the two testifying experts in this case; they agree that Clark was schizophrenic, but they reach opposite conclusions on whether his mental disease left him bereft of cognitive or moral capacity. Finally, there are particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity: on whether the mental disease rendered a particular defendant incapable of the cognition necessary for moral judgment or *mens rea* or otherwise incapable of understanding the wrongfulness of the conduct charged. Unlike observational evidence bearing on *mens rea*, capacity evidence consists of judgment, and judgment is fraught with multiple perils. Although such capacity judgments may be given in the utmost good faith, their potentially tenuous character is indicated by the candor of the defense expert in this very case. He testified that Clark lacked the capacity to appreciate the circumstances realistically and to understand the wrongfulness of what he was doing, but he admitted that no one knew exactly what was on Clark's mind at the time of the shooting. Even when an expert is confident that his understanding of the mind is reliable, judgment addressing the basic categories of capacity requires a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility. Pp. 33–38.

(d) For these reasons, there is also no cause to claim that channeling evidence on mental disease and capacity offends any "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson*, *supra*, at 202. P. 38.

Affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined, and in which BREYER, J., joined except as to Parts III–B and III–C and the ultimate disposition. BREYER, J., filed an opinion concurring in part and dissenting in part. KENNEDY, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 05–5966

ERIC MICHAEL CLARK, PETITIONER *v.* ARIZONA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

[June 29, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

The case presents two questions: whether due process prohibits Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the *mens rea*, or guilty mind). We hold that there is no violation of due process in either instance.

I

In the early hours of June 21, 2000, Officer Jeffrey Moritz of the Flagstaff Police responded in uniform to complaints that a pickup truck with loud music blaring was circling a residential block. When he located the truck, the officer turned on the emergency lights and siren of his marked patrol car, which prompted petitioner Eric Clark, the truck's driver (then 17), to pull over. Officer Moritz got out of the patrol car and told Clark to stay where he was. Less than a minute later, Clark shot the

officer, who died soon after but not before calling the police dispatcher for help. Clark ran away on foot but was arrested later that day with gunpowder residue on his hands; the gun that killed the officer was found nearby, stuffed into a knit cap.

Clark was charged with first-degree murder under Ariz. Rev. Stat. Ann. §13–1105(A)(3) (West Supp. 2005) for intentionally or knowingly killing a law enforcement officer in the line of duty.[1] In March 2001, Clark was found incompetent to stand trial and was committed to a state hospital for treatment, but two years later the same trial court found his competence restored and ordered him to be tried. Clark waived his right to a jury, and the case was heard by the court.

At trial, Clark did not contest the shooting and death, but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so, as required by the statute. Accordingly, the prosecutor offered circumstantial evidence that Clark knew Officer Moritz was a law enforcement officer. The evidence showed that the officer was in uniform at the time, that he caught up with Clark in a marked police car with emergency lights and siren going, and that Clark acknowledged the symbols of police authority and stopped. The testimony for the prosecution indicated that Clark had intentionally lured an officer to the scene to kill him, having told some people a few weeks before the incident that he wanted to shoot police officers. At the close of the State's evidence, the trial court denied Clark's motion for judgment of acquittal for failure to prove intent to kill a

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[1]Section 13–1105(A)(3) provides that "[a] person commits first degree murder if . . . [i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

law enforcement officer or knowledge that Officer Moritz was a law enforcement officer.

In presenting the defense case, Clark claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence, §13–502(C) (West 2001), that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong," §13–502(A).[2] Second, he aimed to rebut the prosecution's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly to kill a law enforcement officer. See, *e.g.*, Record in No. CR 2000–538 (Ariz. Super. Ct.), Doc. 374 (hereinafter Record).

The trial court ruled that Clark could not rely on evidence bearing on insanity to dispute the *mens rea*. The court cited *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046 (en banc), cert. denied, 520 U. S. 1234 (1997), which "refused to allow psychiatric testimony to negate specific intent," 187 Ariz., at 541, 931 P. 2d, at 1051, and held that "Ari-

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[2]Section 13–502(A) provides in full that

"A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct."

A defendant found "guilty except insane" is committed to a state mental health facility for treatment. See §13–502(D).

zona does not allow evidence of a defendant's mental disorder short of insanity . . . to negate the *mens rea* element of a crime," *ibid.*[3]

As to his insanity, then, Clark presented testimony from classmates, school officials, and his family describing his increasingly bizarre behavior over the year before the shooting. Witnesses testified, for example, that paranoid delusions led Clark to rig a fishing line with beads and wind chimes at home to alert him to intrusion by invaders, and to keep a bird in his automobile to warn of airborne poison. There was lay and expert testimony that Clark thought Flagstaff was populated with "aliens" (some impersonating government agents), the "aliens" were trying to kill him, and bullets were the only way to stop them. A psychiatrist testified that Clark was suffering from paranoid schizophrenia with delusions about "aliens" when he killed Officer Moritz, and he concluded that Clark was incapable of luring the officer or understanding right from wrong and that he was thus insane at the time of the killing. In rebuttal, a psychiatrist for the State gave his opinion that Clark's paranoid schizophrenia did not keep him from appreciating the wrongfulness of his conduct, as shown by his actions before and after the shooting (such as circling the residential block with music blaring as if to lure the police to intervene, evading the police after the shooting, and hiding the gun).

At the close of the defense case consisting of this evidence bearing on mental illness, the trial court denied Clark's renewed motion for a directed verdict grounded on failure of the prosecution to show that Clark knew the

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[3] The trial court permitted Clark to introduce this evidence, whether primarily going to insanity or lack of intent, "because it goes to the insanity issue and because we're not in front of a jury." App. 9. It also allowed him to make an offer of proof as to intent to preserve the issue on appeal. *Ibid.*

victim was a police officer.[4] The judge then issued a special verdict of first-degree murder, expressly finding that Clark shot and caused the death of Officer Moritz beyond a reasonable doubt and that Clark had not shown that he was insane at the time. The judge noted that though Clark was indisputably afflicted with paranoid schizophrenia at the time of the shooting, the mental illness "did not . . . distort his perception of reality so severely that he did not know his actions were wrong." App. 334. For this conclusion, the judge expressly relied on "the facts of the crime, the evaluations of the experts, [Clark's] actions and behavior both before and after the shooting, and the observations of those that knew [Clark]." *Id.*, at 333. The sentence was life imprisonment without the possibility of release for 25 years.

Clark moved to vacate the judgment and sentence, arguing, among other things, that Arizona's insanity test and its *Mott* rule each violate due process. As to the insanity standard, Clark claimed (as he had argued earlier) that the Arizona Legislature had impermissibly narrowed its standard in 1993 when it eliminated the first part of the two-part insanity test announced in *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). The court denied the motion.

The Court of Appeals of Arizona affirmed Clark's conviction, treating the conclusion on sanity as supported by enough evidence to withstand review for abuse of discretion, and holding the State's insanity scheme consistent with due process. App. 336. As to the latter, the Court of Appeals reasoned that there is no constitutional requirement to recognize an insanity defense at all, the bounds of

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[4]Clark did not at this time make an additional offer of proof, as contemplated by the trial court when it ruled that it would consider evidence bearing on insanity as to insanity but not as to *mens rea*. See n. 3, *supra*.

which are left to the State's discretion. Beyond that, the appellate court followed *Mott*, reading it as barring the trial court's consideration of evidence of Clark's mental illness and capacity directly on the element of *mens rea*. The Supreme Court of Arizona denied further review.

We granted certiorari to decide whether due process prohibits Arizona from thus narrowing its insanity test or from excluding evidence of mental illness and incapacity due to mental illness to rebut evidence of the requisite criminal intent. 546 U. S. ___ (2005). We now affirm.

II

Clark first says that Arizona's definition of insanity, being only a fragment of the Victorian standard from which it derives, violates due process. The landmark English rule in *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843), states that

> "the jurors ought to be told . . . that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722.

The first part asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing. The second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong.

When the Arizona Legislature first codified an insanity rule, it adopted the full *M'Naghten* statement (subject to modifications in details that do not matter here):

> "A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong." Ariz. Rev. Stat. Ann. §13–502 (West 1978).[5]

In 1993, the legislature dropped the cognitive incapacity part, leaving only moral incapacity as the nub of the stated definition. See 1993 Ariz. Sess. Laws ch. 256, §§2–3.[6] Under current Arizona law, a defendant will not be adjudged insane unless he demonstrates that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong," Ariz. Rev. Stat. Ann. §13–502(A) (West 2001).

A

Clark challenges the 1993 amendment excising the express reference to the cognitive incapacity element. He insists that the side-by-side *M'Naghten* test represents the minimum that a government must provide in recognizing an alternative to criminal responsibility on grounds of mental illness or defect, and he argues that elimination of

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[5]This statutory standard followed the Arizona Supreme Court's declaration that Arizona has "uniformly adhered" to the two-part *M'Naghten* standard. *State* v. *Schantz*, 98 Ariz. 200, 206, 403 P. 2d 521, 525 (1965) (citing cases), cert. denied, 382 U. S. 1015 (1966).

[6]This change was accompanied by others, principally an enumeration of mental states excluded from the category of "mental disease or defect," such as voluntary intoxication and other conditions, and a change of the insanity verdict from "not responsible for criminal conduct" by reason of insanity to "guilty except insane." See 1993 Ariz. Sess. Laws ch. 256, §§2–3. The 1993 amendments were prompted, at least in part, by an acquittal by reason of insanity in a murder case. See Note, Arizona's Insane Response to Insanity, 40 Ariz. L. Rev. 287, 290 (1998).

the *M'Naghten* reference to nature and quality "'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson* v. *New York*, 432 U. S. 197, 202 (1977) (quoting *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)); see also *Leland* v. *Oregon*, 343 U. S. 790, 798 (1952).

The claim entails no light burden, see *Montana* v. *Egelhoff*, 518 U. S. 37, 43 (1996) (plurality opinion), and Clark does not carry it. History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses, see *Patterson*, *supra*, at 210; see also *Foucha* v. *Louisiana*, 504 U. S. 71, 96 (1992) (KENNEDY, J., dissenting).

Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with four traditional strains variously combined to yield a diversity of American standards. The main variants are the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests.[7] The first two emanate from the alternatives stated in the *M'Naghten* rule. The volitional incapacity or irresistible-impulse test, which surfaced over two centuries ago (first in England,[8] then in this country[9]), asks whether a person was so lacking in volition due to a

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[7]"Capacity" is understood to mean the ability to form a certain state of mind or motive, understand or evaluate one's actions, or control them.

[8]See *Queen* v. *Oxford*, 9 Car. & P. 525, 546, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible"); *Hadfield's Case*, 27 How. St. Tr. 1281, 1314–1315, 1354–1355 (K. B. 1800). But cf. *Queen* v. *Burton*, 3 F. & F. 772, 780, 176 Eng. Rep. 354, 357 (1863) (rejecting the irresistible-impulse test as "a most dangerous doctrine").

[9]*E.g.*, *Parsons* v. *State*, 81 Ala. 577, 2 So. 854 (1887); *State* v. *Thompson*, Wright's Ohio Rep. 617 (1834).

mental defect or illness that he could not have controlled his actions. And the product-of-mental-illness test was used as early as 1870,[10] and simply asks whether a person's action was a product of a mental disease or defect.[11] Seventeen States and the Federal Government have adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components.[12] One State has adopted only *M'Naghten*'s cogni-

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[10] *State* v. *Jones*, 50 N. H. 369 (1871); *State* v. *Pike*, 49 N. H. 399 (1870).

[11] This distillation of the Anglo-American insanity standards into combinations of four building blocks should not be read to signify that no other components contribute to these insanity standards or that there are no material distinctions between jurisdictions testing insanity with the same building blocks. For example, the jurisdictions limit, in varying degrees, which sorts of mental illness or defect can give rise to a successful insanity defense. Compare, *e.g.*, Ariz. Rev. Stat. Ann. §13–502(A) (West 2001) (excluding from definition of "mental disease or defect" acute voluntary intoxication, withdrawal from alcohol or drugs, character defects, psychosexual disorders, and impulse control disorders) with, *e.g.*, Ind. Code §35–41–3–6(b) (West 2004) (excluding from definition of "mental disease or defect" "abnormality manifested only by repeated unlawful or antisocial conduct"). We need not compare the standards under a finer lens because our coarser analysis shows that the standards vary significantly.

[12] See 18 U. S. C. §17; Ala. Code §13A–3–1 (1994); Cal. Penal Code Ann. §25 (West 1999); Colo. Rev. Stat. §16–8–101.5 (2005); Fla. Stat. §775.027 (2003); Iowa Code §701.4 (2005); Minn. Stat. §611.026 (2004); *Stevens* v. *State*, 806 So. 2d 1031, 1050–1051 (Miss. 2001); Mo. Rev. Stat. §562.086 (2000); *State* v. *Harms*, 263 Neb. 814, 836–837, 643 N. W. 2d 359, 378–379 (2002); Nev. Rev. Stat. §194.010 (2003); *Finger* v. *State*, 117 Nev. 548, 553–577, 27 P. 3d 66, 70–85 (2001); N. J. Stat. Ann. §2C:4–1 (West 2005); N. Y. Penal Law Ann. §40.15 (West 2004); *State* v. *Thompson*, 328 N. C. 477, 485–486, 402 S. E. 2d 386, 390 (1991); *Burrows* v. *State*, 640 P. 2d 533, 540–541 (Okla. Crim. App. 1982) (interpreting statutory language excusing from criminal responsibility mentally ill defendants when "at the time of committing the act charged against them they were incapable of knowing its wrongfulness," Okla. Stat., Tit. 21, §152(4) (West 2001), to mean the two-part *M'Naghten* test); 18 Pa. Cons. Stat. §315 (2002); Tenn. Code Ann. §39–11–501 (2002); Wash. Rev. Code §9A.12.010 (2004). North Dakota has

tive incapacity test,[13] and 10 (including Arizona) have adopted the moral incapacity test alone.[14] Fourteen jurisdictions, inspired by the Model Penal Code,[15] have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either (generally by showing a defendant's substantial lack of capacity) being enough to excuse.[16] Three States combine a full *M'Naghten* test with a volitional incapacity formula.[17] And New Hampshire alone stands by the product-

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a unique test, which appears to be a modified version of *M'Naghten*, asking whether a defendant "lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality," N. D. Cent. Code Ann. §12.1–04.1–01(1)(a) (Lexis 1997), when "[i]t is an essential element of the crime charged that the individual act willfully," §12.1–04.1–01(1)(b).

[13] Alaska Stat. §12.47.010 (2004).

[14] Ariz. Rev. Stat. Ann. §13–502 (West 2001); Del. Code Ann., Tit. 11, §401 (1995); Ind. Code §35–41–3–6 (West 2004); Ill. Comp. Stat., ch. 720, §5/6-2 (West 2004); La. Stat. Ann. §14:14 (West 1997); Me. Rev. Stat. Ann., Tit. 17–A, §39 (2006); Ohio Rev. Code Ann. §2901.01(A)(14) (Lexis 2006); S. C. Code Ann. §17–24–10 (2003); S. D. Codified Laws §22–1–2(20) (2005 Supp. Pamphlet); Tex. Penal Code Ann. §8.01 (West 2003).

[15] ALI, Model Penal Code §4.01(1) (Proposed Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law").

[16] Ark. Code Ann. §5–2–312 (2006); Conn. Gen. Stat. §53a–13 (2005); *Malede* v. *United States*, 767 A. 2d 267, 269 (D. C. 2001); Ga. Code Ann. §§16–3–2, 16–3–3 (2003); Haw. Rev. Stat. §704–400 (1993); Ky. Rev. Stat. Ann. §504.020 (West 2003); Md. Crim. Proc. Code Ann. §3–109 (Lexis 2001); *Commonwealth* v. *McLaughlin*, 431 Mass. 506, 508, 729 N. E. 2d 252, 255 (2000); Ore. Rev. Stat. §161.295 (2005); *State* v. *Martinez*, 651 A. 2d 1189, 1193 (R. I. 1994); Vt. Stat. Ann., Tit. 13, §4801 (1998); *State* v. *Lockhart*, 208 W. Va. 622, 630, 542 S. E. 2d 443, 451 (2000); Wis. Stat. §971.15 (2003–2004); Wyo. Stat. Ann. §7–11–304 (2005).

[17] Mich. Comp. Laws Ann. §768.21a (West 2000); *State* v. *Hartley*, 90 N. M. 488, 490–491, 565 P. 2d 658, 660–661 (1977); *Bennett* v. *Com-*

of-mental-illness test.[18] The alternatives are multiplied further by variations in the prescribed insanity verdict: a significant number of these jurisdictions supplement the traditional "not guilty by reason of insanity" verdict with an alternative of "guilty but mentally ill."[19] Finally, four States have no affirmative insanity defense,[20] though one provides for a "guilty and mentally ill" verdict.[21] These four, like a number of others that recognize an affirmative insanity defense, allow consideration of evidence of mental illness directly on the element of *mens rea* defining the offense.[22]

With this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense,

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*monwealth*, 29 Va. App. 261, 277, 511 S. E. 2d 439, 446–447 (1999).

[18] *State* v. *Plante*, 134 N. H. 456, 461, 594 A. 2d 1279, 1283 (1991).

[19] See, *e.g.*, Alaska Stat. §§12.47.020(c), 12.47.030 (2004); Del. Code Ann., Tit. 11, §401 (1995); Ga. Code Ann. §17–7–131 (2004); Ill. Comp. Stat., ch. 720, §5/6–2 (West 2004); Ind. Code §§35–35–2–1, 35–36–1–1, 35–36–2–3 (West 2004); Ky. Rev. Stat. Ann. §504.130 (West 2003); Mich. Comp. Laws Ann. §768.36 (West Supp. 2006); N. M. Stat. Ann. §31–9–3 (2000); 18 Pa. Cons. Stat. §314 (2002); S. C. Code Ann. §17–24–20 (2003); S. D. Codified Laws §23A–26–14 (2004). Usually, a defendant found "guilty but mentally ill" will receive mental-health treatment until his mental health has rebounded, at which point he must serve the remainder of his imposed sentence. See, *e.g.*, Alaska Stat. §12.47.050 (2004).

[20] Idaho Code §18–207 (Lexis 2004); Kan. Stat. Ann. §22–3220 (1995); Mont. Code Ann. §§46–14–102, 46–14–311 (2005); Utah Code Ann. §76–2–305 (Lexis 2003). We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter.

[21] §§77–16a–101, 77–16a–103, 77–16a–104 (Lexis 2003).

[22] See statutes cited in n. 20, *supra*.

with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement. See *infra*, at 31–33; cf. *Leland*, 343 U. S., at 800–801 (no due process violation for adopting the *M'Naghten* standard rather than the irresistible-impulse test because scientific knowledge does not require otherwise and choice of test is a matter of policy). There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.

B

Nor does Arizona's abbreviation of the *M'Naghten* statement raise a proper claim that some constitutional minimum has been shortchanged. Clark's argument of course assumes that Arizona's former statement of the *M'Naghten* rule, with its express alternative of cognitive incapacity, was constitutionally adequate (as we agree). That being so, the abbreviated rule is no less so, for cognitive incapacity is relevant under that statement, just as it was under the more extended formulation, and evidence going to cognitive incapacity has the same significance under the short form as it had under the long.

Though Clark is correct that the application of the moral incapacity test (telling right from wrong) does not necessarily require evaluation of a defendant's cognitive capacity to appreciate the nature and quality of the acts charged against him, see Brief for Petitioner 46–47, his argument fails to recognize that cognitive incapacity is itself enough to demonstrate moral incapacity. Cognitive incapacity, in other words, is a sufficient condition for establishing a defense of insanity, albeit not a necessary

one. As a defendant can therefore make out moral incapacity by demonstrating cognitive incapacity, evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible. In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime.[23] Indeed, when the two-part rule was still in effect, the Supreme Court of Arizona held that a jury instruction on insanity containing the moral incapacity part but not a full recitation of the cognitive incapacity part was fine, as the cognitive incapacity part might be "'treated as adding nothing to the requirement that the accused know his act was wrong.'" *State* v. *Chavez*, 143 Ariz. 238, 239, 693 P. 2d 893, 894 (1984) (quoting A. Goldstein, The Insanity Defense 50 (1967)).

The Court of Appeals of Arizona acknowledged as much in this case, too, see App. 350 ("It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong'"), and thus aligned itself with the long-accepted understanding that the cognitively incapacitated are a subset of the morally incapacitated within the meaning of the standard *M'Naghten* rule, see, *e.g.*, Goldstein, *supra*, at 51 ("In those situations where the accused does not know the nature and quality of his act, in the broad sense, he will not know that it was wrong, no matter what construction 'wrong' is given"); 1

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[23]He might, of course, have thought delusively he was doing something just as wrongful as the act charged against him, but this is not the test: he must have understood that he was committing the act charged and that it was wrongful, see Ariz. Rev. Stat. Ann. §13–502(A) (West 2001) ("A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong").

W. LaFave, Substantive Criminal Law §7.2(b)(3), p. 536 (2d ed. 2003) ("Many courts feel that knowledge of 'the nature and quality of the act' is the mere equivalent of the ability to know that the act was wrong" (citing cases)); *id.*, §7.2(b)(4), at 537 ("If the defendant does not know the nature and quality of his act, then quite obviously he does not know that his act is 'wrong,' and this is true without regard to the interpretation given to the word 'wrong'"); cf. 1 R. Gerber, Criminal Law of Arizona 502–7, n. 1 (2d ed. 1993).[24]

Clark, indeed, adopted this very analysis himself in the

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[24]We think this logic holds true in the face of the usual rule of statutory construction of "'"giv[ing] effect, if possible, to every clause and word of a statute,"'" *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955)); see also 2 J. Sutherland, Statutes and Statutory Construction §4705 (3d ed. 1943). Insanity standards are formulated to guide the factfinder to determine the blameworthiness of a mentally ill defendant. See, *e.g.*, *Jones* v. *United States*, 463 U. S. 354, 373, n. 4 (1983) (Brennan, J., dissenting). The *M'Naghten* test is a sequential test, first asking the factfinder to conduct the easier enquiry whether a defendant knew the nature and quality of his actions. If not, the defendant is to be considered insane and there is no need to pass to the harder and broader enquiry whether the defendant knew his actions were wrong. And, because, owing to this sequence, the factfinder is to ask whether a defendant lacks moral capacity only when he possesses cognitive capacity, the only defendants who will be found to lack moral capacity are those possessing cognitive capacity. Cf. 2 C. Torcia, Wharton's Criminal Law §101 (15th ed. 1994). Though, before 1993, Arizona had in place the full *M'Naghten* test with this sequential enquiry, see, *e.g.*, *Schantz*, 98 Ariz., at 207, 403 P. 2d, at 525, it would appear that the legislature eliminated the cognitive capacity part not to change the meaning of the insanity standard but to implement its judgment that a streamlined standard with only the moral capacity part would be easier for the jury to apply, see Arizona House of Representative Judiciary Committee Notes 3 (Mar. 18, 1993); 1 R. Gerber, Criminal Law of Arizona 502–6, 502–11 (2d ed. 1993 and Supp. 2000). This is corroborated by the State's choice for many years against revising the applicable recommended jury instruction (enumerating the complete *M'Naghten* test) in order to match the amended statutory standard. See 1 Gerber, *supra*, at 502–6.

trial court: "[I]f [Clark] did not know he was shooting at a police officer, or believed he had to shoot or be shot, even though his belief was not based in reality, this would establish that he did not know what he was doing was wrong." Record, Doc. 374, at 1. The trial court apparently agreed, for the judge admitted Clark's evidence of cognitive incapacity for consideration under the State's moral incapacity formulation. And Clark can point to no evidence bearing on insanity that was excluded. His psychiatric expert and a number of lay witnesses testified to his delusions, and this evidence tended to support a description of Clark as lacking the capacity to understand that the police officer was a human being. There is no doubt that the trial judge considered the evidence as going to an issue of cognitive capacity, for in finding insanity not proven he said that Clark's mental illness "did not . . . distort his perception of reality so severely that he did not know his actions were wrong," App. 334.

We are satisfied that neither in theory nor in practice did Arizona's 1993 abridgment of the insanity formulation deprive Clark of due process.

III

Clark's second claim of a due process violation challenges the rule adopted by the Supreme Court of Arizona in *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046 (en banc), cert. denied, 520 U. S. 1234 (1997). This case ruled on the admissibility of testimony from a psychologist offered to show that the defendant suffered from battered women's syndrome and therefore lacked the capacity to form the *mens rea* of the crime charged against her. The opinion variously referred to the testimony in issue as "psychological testimony," 187 Ariz., at 541, 931 P. 2d, at 1051, and "expert testimony," *ibid.*, and implicitly equated it with "expert psychiatric evidence," *id.*, at 540, 931 P. 2d, at 1050 (internal quotation marks omitted), and "psychiatric

testimony," *id.*, at 541, 931 P. 2d, at 1051.[25] The state court held that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its bearing on an insanity defense; such evidence could not be considered on the element of *mens rea*, that is, what the State must show about a defendant's mental state (such as intent or understanding) when he performed the act charged against him. See *id.*, at 541, 544, 931 P. 2d, at 1051, 1054.[26]

A

Understanding Clark's claim requires attention to the categories of evidence with a potential bearing on *mens rea*. First, there is "observation evidence" in the everyday sense, testimony from those who observed what Clark did and heard what he said; this category would also include testimony that an expert witness might give about Clark's tendency to think in a certain way and his behavioral characteristics. This evidence may support a professional diagnosis of mental disease and in any event is the kind of evidence that can be relevant to show what in fact was on Clark's mind when he fired the gun. Observation evidence in the record covers Clark's behavior at home and with friends, his expressions of belief around the time of the killing that "aliens" were inhabiting the bodies of local people (including government agents),[27] his driving around

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[25] We thus think the dissent reads *Mott* too broadly. See *post*, at 6–7 (opinion of KENNEDY, J.) (no distinction between observation and mental-disease testimony, see *infra*, at 16–17, or lay and expert).

[26] The more natural reading of *Mott* suggests to us that this evidence cannot be considered as to *mens rea* even if the defendant establishes his insanity, though one might read *Mott* otherwise.

[27] Clark's parents testified that, in the months before the shooting and even days beforehand, Clark called them "aliens" and thought that "aliens" were out to get him. See, *e.g.*, Tr. of Bench Trial in No. CR 2000–538, pp. 110–112, 136, 226–228 (Aug. 20, 2003). One night before

the neighborhood before the police arrived, and so on. Contrary to the dissent's characterization, see *post*, at 2 (opinion of KENNEDY, J.), observation evidence can be presented by either lay or expert witnesses.

Second, there is "mental-disease evidence" in the form of opinion testimony that Clark suffered from a mental disease with features described by the witness. As was true here, this evidence characteristically but not always[28] comes from professional psychologists or psychiatrists who testify as expert witnesses and base their opinions in part on examination of a defendant, usually conducted after the events in question. The thrust of this evidence was that, based on factual reports, professional observations, and tests, Clark was psychotic at the time in question, with a condition that fell within the category of schizophrenia.

Third, there is evidence we will refer to as "capacity evidence" about a defendant's capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*). This, too, is opinion evidence. Here, as it usually does,[29] this testimony came from the same experts and concentrated on those specific details of the mental condition that make the difference between sanity and insanity under the Arizona definition.[30] In their respec-

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the shooting, according to Clark's mother, Clark repeatedly viewed a popular film characterized by her as telling a story about "aliens" masquerading as government agents, a story Clark insisted was real despite his mother's protestations to the contrary. See *id.*, at 59–60 (Aug. 21, 2003). And two months after the shooting, Clark purportedly told his parents that his hometown, Flagstaff, was inhabited principally by "aliens," who had to be stopped, and that the only way to stop them was with bullets. See, *e.g.*, *id.*, at 131–132 (Aug. 20, 2003); *id.*, at 24–25 (Aug. 21, 2003).

[28] This is contrary to the dissent's understanding. See *post*, at 2–3 (opinion of KENNEDY, J.).

[29] In conflict with the dissent's characterization, see *post*, at 2 (opinion of KENNEDY, J.), it does not always, however, come from experts.

[30] Arizona permits capacity evidence, see, *e.g.*, *State* v. *Sanchez*, 117

tive testimony on these details the experts disagreed: the defense expert gave his opinion that the symptoms or effects of the disease in Clark's case included inability to appreciate the nature of his action and to tell that it was wrong, whereas the State's psychiatrist was of the view that Clark was a schizophrenic who was still sufficiently able to appreciate the reality of shooting the officer and to know that it was wrong to do that.[31]

A caveat about these categories is in order. They attempt to identify different kinds of testimony offered in this case in terms of explicit and implicit distinctions made in *Mott*. What we can say about these categories goes to their cores, however, not their margins. Exact

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Ariz. 369, 373, 573 P. 2d 60, 64 (1977); see also Ariz. Rule Evid. 704 (2006) (allowing otherwise admissible evidence on testimony "embrac[ing] an ultimate issue to be decided by the trier of fact"), though not every jurisdiction permits such evidence on the ultimate issue of insanity. See, *e.g.*, Fed. Rule Evid. 704(b) ("No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone"); *United States* v. *Dixon*, 185 F. 3d 393, 400 (CA5 1999) (in the face of mental-disease evidence, Rule 704(b) prohibits an expert "from testifying that [the mental-disease evidence] does or does not prevent the defendant from appreciating the wrongfulness of his actions").

[31] Arizona permits evidence bearing on insanity to be presented by either lay or expert witnesses. See *State* v. *Bay*, 150 Ariz. 112, 116, 722 P. 2d 280, 284 (1986). According to *Bay*, "[f]oundationally, a lay witness must have had an opportunity to observe the past conduct and history of a defendant; the fact that he is a lay witness goes not to the admissibility of the testimony but rather to its weight." *Ibid.* (citation omitted); see also *State* v. *Hughes*, 193 Ariz. 72, 83, 969 P. 2d 1184, 1195 (1998). In fact, a defendant can theoretically establish insanity solely via lay testimony. See *Bay*, 150 Ariz., at 116, 722 P. 2d, at 284. But cf. *State* v. *McMurtrey*, 136 Ariz. 93, 100, 664 P. 2d 637, 644 (1983) ("[I]t is difficult to imagine how a defendant could place his or her sanity in issue . . . without expert testimony as to the defendant's state of mind at the time of the crime").

limits have thus not been worked out in any Arizona law that has come to our attention, and in this case, neither the courts in their rulings nor counsel in objections invoked or required precision in applying the *Mott* rule's evidentiary treatment, as we explain below. Necessarily, then, our own decision can address only core issues, leaving for other cases any due process claims that may be raised about the treatment of evidence whose categorization is subject to dispute.

B

It is clear that *Mott* itself imposed no restriction on considering evidence of the first sort, the observation evidence. We read the *Mott* restriction to apply, rather, to evidence addressing the two issues in testimony that characteristically comes only from psychologists or psychiatrists qualified to give opinions as expert witnesses: mental-disease evidence (whether at the time of the crime a defendant suffered from a mental disease or defect, such as schizophrenia) and capacity evidence (whether the disease or defect left him incapable of performing or experiencing a mental process defined as necessary for sanity such as appreciating the nature and quality of his act and knowing that it was wrong).

*Mott* was careful to distinguish this kind of opinion evidence from observation evidence generally and even from observation evidence that an expert witness might offer, such as descriptions of a defendant's tendency to think in a certain way or his behavioral characteristics; the Arizona court made it clear that this sort of testimony was perfectly admissible to rebut the prosecution's evidence of *mens rea*, 187 Ariz., at 544, 931 P. 2d, at 1054. Thus, only opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which sanity depends under the Arizona rule, is restricted.

In this case, the trial court seems to have applied the *Mott* restriction to all evidence offered by Clark for the purpose of showing what he called his inability to form the required *mens rea*, see, *e.g.*, Record, Doc. 406, pp. 7–10, (that is, an intent to kill a police officer on duty, or an understanding that he was engaging in the act of killing such an officer, see Ariz. Rev. Stat. Ann. §13–1105(A)(3) (West Supp. 2005)). Thus, the trial court's restriction may have covered not only mental-disease and capacity evidence as just defined, but also observation evidence offered by lay (and expert) witnesses who described Clark's unusual behavior. Clark's objection to the application of the *Mott* rule does not, however, turn on the distinction between lay and expert witnesses or the kinds of testimony they were competent to present.[32]

C

There is some, albeit limited, disagreement between the dissent and ourselves about the scope of the claim of error properly before us. To start with matters of agreement, all Members of the Court agree that Clark's general attack on the *Mott* rule covers its application in confining consideration of capacity evidence to the insanity defense.

In practical terms, our agreement on issues presented extends to a second point. JUSTICE KENNEDY understands that Clark raised an objection to confining mental-disease evidence to the insanity issue. As he sees it, Clark in effect claimed that in dealing with the issue of *mens rea* the trial judge should have considered expert testimony on what may characteristically go through the mind of a

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[32] With respect to "the limited factual issues the trial court held it could consider under [Ariz. Rev. Stat. Ann. §]13–502 and *Mott*, defense counsel made no additional 'offer of proof' at the conclusion of the case but preserved [Clark's] legal contentions by asking the court to consider all of the evidence presented in determining whether the state had proved its case." Brief for Petitioner 10, n. 20 (citations omitted).

schizophrenic, when the judge considered what in fact was in Clark's mind at the time of the shooting. See *post*, at 3 (dissenting opinion) ("[T]he opinion that Clark had paranoid schizophrenia—an opinion shared by experts for both the prosecution and defense—bears on efforts to determine, as a factual matter, whether he knew he was killing a police officer"). He thus understands that defense counsel claimed a right to rebut the State's *mens rea* demonstration with testimony about how schizophrenics may hallucinate voices and other sounds, about their characteristic failure to distinguish the content of their imagination from what most people perceive as exterior reality, and so on. It is important to be clear that this supposed objection was not about dealing with testimony based on observation of Clark showing that he had auditory hallucinations when he was driving around, or failed in fact to appreciate objective reality when he shot; this objection went to use of testimony about schizophrenics, not about Clark in particular. While we might dispute how clearly Clark raised this objection, we have no doubt that the objection falls within a general challenge to the *Mott* rule; we understand that *Mott* is meant to confine to the insanity defense any consideration of characteristic behavior associated with mental disease, see 187 Ariz., at 544, 931 P. 2d, at 1054 (contrasting *State* v. *Christensen*, 129 Ariz. 32, 628 P. 2d 580 (1991), and *State* v. *Gonzales*, 140 Ariz. 349, 681 P. 2d 1368 (1984)). We will therefore assume for argument that Clark raised this claim, as we consider the due process challenge to the *Mott* rule.

The point on which we disagree with the dissent, however, is this: did Clark apprise the Arizona courts that he believed the trial judge had erroneously limited the consideration of observation evidence, whether from lay witnesses like Clark's mother or (possibly) the expert witnesses who observed him? This sort of evidence was not covered by the *Mott* restriction, and confining it to the

insanity issue would have been an erroneous application of *Mott* as a matter of Arizona law. For the following reasons we think no such objection was made in a way the Arizona courts could have understood it, and that no such issue is before us now. We think the only issue properly before us is the challenge to *Mott* on due process grounds, comprising objections to limits on the use of mental-disease and capacity evidence.

It is clear that the trial judge intended to apply *Mott:*

> "[R]ecognizing that much of the evidence that [the defense is] going to be submitting, in fact all of it, as far as I know . . . that has to do with the insanity could also arguably be made along the lines of the Mott issue as to form and intent and his capacity for the intent. I'm going to let you go ahead and get all that stuff in because it goes to the insanity issue and because we're not in front of a jury. At the end, I'll let you make an offer of proof as to the intent, the Mott issues, but I still think the supreme court decision is the law of the land in this state." App. 9.

At no point did the trial judge specify any particular evidence that he refused to consider on the *mens rea* issue. Nor did defense counsel specify any observation or other particular evidence that he claimed was admissible but wrongly excluded on the issue of *mens rea*, so as to produce a clearer ruling on what evidence was being restricted on the authority of *Mott* and what was not. He made no "offer of proof" in the trial court;[33] and although

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[33] We do not agree with the State's argument that the failure to make an offer of proof, see n. 4, *supra*, is a bar to pressing Clark's claim about the admissibility of mental-illness or capacity evidence as to *mens rea*, see Brief for Respondent 27–29, especially when the Arizona Court of Appeals rejected Clark's argument on the merits rather than clearly on this ground, see App. 351–353; see also *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983) ("[I]t is not clear from the opinion itself that the state

his brief in the Arizona Court of Appeals stated at one point that it was not inconsistent with *Mott* to consider nonexpert evidence indicating mental illness on the issue of *mens rea*, and argued that the trial judge had failed to do so, Appellant's Opening Brief in No. 1CA–CR–03–0851 etc. (Ariz. Ct. App.), pp. 48–49 (hereinafter Appellant's Opening Brief), he was no more specific than that, see, *e.g.*, *id.*, at 52 ("The Court's ruling in *Mott* and the trial court's refusal to consider whether as a result of suffering from paranoid schizophrenia [Clark] could not formulate the *mens rea* necessary for first degree murder violated his right to due process"). Similarly, we read the Arizona Court of Appeals to have done nothing more than rely on *Mott* to reject the claim that due process forbids restricting evidence bearing on "*[a]bility to [f]orm [m]ens [r]ea*," App. 351 (emphasis in original), (*i.e.*, mental-disease and capacity evidence) to the insanity determination. See *id.*, at 351–353.

This failure in the state courts to raise any clear claim about observation evidence, see Appellant's Opening Brief 46–52, is reflected in the material addressed to us, see Brief for Petitioner 13–32. In this Court both the question presented and the following statement of his position were couched in similarly worded general terms:

> "I. ERIC WAS DENIED DUE PROCESS WHEN THE TRIAL COURT REFUSED TO CONSIDER EVIDENCE OF HIS SEVERE MENTAL ILLNESS IN DETERMINING FACTUALLY WHETHER THE PROSECUTION PROVED THE MENTAL ELEMENTS OF THE CRIME CHARGED." *Id.*, at 13.

But as his counsel made certain beyond doubt in his reply brief,

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court relied upon an adequate and independent state ground and . . . it fairly appears that the state court rested its decision primarily on federal law").

> "Eric's Point I is and always has been an attack on the rule of *State* v. *Mott*, which both courts below held applicable and binding. *Mott* announced a categorical 'rejection of the use of psychological testimony to challenge the *mens rea* element of a crime,' and upheld this rule against federal due process challenge." Reply Brief for Petitioner 2 (citations omitted).

This explanation is supported by other statements in Clark's briefs in both the State Court of Appeals and this Court, replete with the consistently maintained claim that it was error to limit evidence of mental illness and incapacity to its bearing on the insanity defense, excluding it from consideration on the element of *mens rea*. See, *e.g.*, Appellant's Opening Brief 46, 47, 51; Brief for Petitioner 11, 13, 16, 20–23.

In sum, the trial court's ruling, with its uncertain edges, may have restricted observation evidence admissible on *mens rea* to the insanity defense alone, but we cannot be sure.[34] But because a due process challenge to such a restriction of observation evidence was, by our measure, neither pressed nor passed upon in the Arizona Court of Appeals, we do not consider it. See, *e.g.*, *Kentucky* v. *Stincer*, 482 U. S. 730, 747, n. 22 (1987); *Illinois* v. *Gates*, 462 U. S. 213, 217–224 (1983). What we do know, and now

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[34]We therefore have no reason to believe that the courts of Arizona would have failed to restrict their application of *Mott* to the professional testimony the *Mott* opinion was stated to cover, if Clark's counsel had specified any observation evidence he claimed to be generally admissible and relevant to *mens rea*. Nothing that we hold here is authority for restricting a factfinder's consideration of observation evidence indicating state of mind at the time of a criminal offense (conventional *mens rea* evidence) as distinct from professional mental-disease or capacity evidence going to ability to form a certain state of mind during a period that includes the time of the offense charged. And, of course, nothing held here prevents Clark from raising this discrete claim when the case returns to the courts of Arizona, if consistent with the State's procedural rules.

consider, is Clark's claim that *Mott* denied due process because it "*precludefd] Eric from contending that ... factual inferences*" of the "mental states which were necessary elements of the crime charged" "*should not be drawn* because the behavior was explainable, instead, as a manifestation of his chronic paranoid schizophrenia." Brief for Petitioner 13 (emphasis in original). We consider the claim, as Clark otherwise puts it, that "Arizona's prohibition of 'diminished capacity' evidence by criminal defendants violates" due process, *ibid.*

D

Clark's argument that the *Mott* rule violates the Fourteenth Amendment guarantee of due process turns on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him.

1

The first presumption is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged, see *Patterson,* 432 U. S., at 210–211; *In re Winship,* 397 U. S. 358, 361–364 (1970), including the mental element or *mens rea.* Before the last century, the *mens rea* required to be proven for particular offenses was often described in general terms like "malice," see, *e.g., In re Eckart,* 166 U. S. 481 (1897); 4 W. Blackstone, Commentaries *21 ("[A]n unwarrantable act without a vicious will is no crime at all"), but the modern tendency has been toward more specific descriptions, as shown in the Arizona statute defining the murder charged against Clark: the State had to prove that in acting to kill the victim, Clark intended to kill a law enforcement officer on duty or knew that the victim was

such an officer on duty. See generally Gardner, The *Mens Rea* Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 Utah L. Rev. 635. As applied to *mens rea* (and every other element), the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt that a defendant's state of mind was in fact what the charge states. See *Winship*, *supra*, at 361–363.

2

The presumption of sanity is equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility. See *Leland*, 343 U. S., at 799; *Davis* v. *United States*, 160 U. S. 469, 486–487 (1895); *M'Naghten's Case*, 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722; see generally 1 LaFave, Substantive Criminal Law §8.3(a), at 598–599, and n. 1. This presumption dispenses with a requirement on the government's part to include as an element of every criminal charge an allegation that the defendant had such a capacity.[35] The force of this presumption, like the presumption of innocence, is measured by the quantum of evidence necessary to overcome it; unlike the presumption of innocence, however, the force of the presumption of sanity varies across the many state and federal jurisdictions, and prior law has recognized considerable leeway on the part of the legislative branch in defining the presumption's strength through the kind of evidence and degree of persuasiveness necessary to overcome it, see *Fisher* v. *United States*, 328 U. S. 463, 466–476 (1946).[36]

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[35] A legislature is nonetheless free to require affirmative proof of sanity by the way it describes a criminal offense, see *Dixon* v. *United States*, *ante*, at ___ (slip op., at 7–9).

[36] Although a desired evidentiary use is restricted, that is not equiva-

There are two points where the sanity or capacity presumption may be placed in issue. First, a State may allow a defendant to introduce (and a factfinder to consider) evidence of mental disease or incapacity for the bearing it can have on the government's burden to show *mens rea*. See, *e.g.*, *State* v. *Perez*, 882 A. 2d 574, 584 (R. I. 2005).[37] In such States the evidence showing incapacity to form the guilty state of mind, for example, qualifies the probative force of other evidence, which considered alone indicates that the defendant actually formed the guilty state of mind. If it is shown that a defendant with mental disease thinks all blond people are robots, he could not have intended to kill a person when he shot a man with blond hair, even though he seemed to act like a man shooting another man.[38] In jurisdictions that allow mental-disease and capacity evidence to be considered on par with any

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lent to a *Sandstrom* presumption. See *Sandstrom* v. *Montana*, 442 U. S. 510, 514–524 (1979) (due process forbids use of presumption that relieves the prosecution of burden of proving mental state by inference of intent from an act).

[37] In fact, Oregon had this scheme in place when we decided *Leland* v. *Oregon*, 343 U. S. 790, 794–796 (1952). We do not, however, read any part of *Leland* to require as a matter of due process that evidence of incapacity be considered to rebut the *mens rea* element of a crime.

[38] We reject the State's argument that *mens rea* and insanity, as currently understood, are entirely distinguishable, so that mental-disease and capacity evidence relevant to insanity is simply irrelevant to *mens rea*. Not only does evidence accepted as showing insanity trump *mens rea*, but evidence of behavior close to the time of the act charged may indicate both the actual state of mind at that time and also an enduring incapacity to form the criminal state of mind necessary to the offense charged. See Brief for American Psychiatric Association et al. as *Amici Curiae* 12–13; Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827, 834–835 (1977); cf. *Powell* v. *Texas*, 392 U. S. 514, 535–536 (1968) (plurality opinion) (the "doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress" are a "collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds").

other relevant evidence when deciding whether the prosecution has proven *mens rea* beyond a reasonable doubt, the evidence of mental disease or incapacity need only support what the factfinder regards as a reasonable doubt about the capacity to form (or the actual formation of) the *mens rea*, in order to require acquittal of the charge. Thus, in these States the strength of the presumption of sanity is no greater than the strength of the evidence of abnormal mental state that the factfinder thinks is enough to raise a reasonable doubt.

The second point where the force of the presumption of sanity may be tested is in the consideration of a defense of insanity raised by a defendant. Insanity rules like *M'Naghten* and the variants discussed in Part II, *supra*, are attempts to define, or at least to indicate, the kinds of mental differences that overcome the presumption of sanity or capacity and therefore excuse a defendant from customary criminal responsibility, see *Jones*, 463 U. S., at 373, n. 4 (Brennan, J., dissenting); D. Hermann, The Insanity Defense: Philosophical, Historical and Legal Perspectives 4 (1983) ("A central significance of the insanity defense ... is the separation of nonblameworthy from blameworthy offenders"), even if the prosecution has otherwise overcome the presumption of innocence by convincing the factfinder of all the elements charged beyond a reasonable doubt. The burden that must be carried by a defendant who raises the insanity issue, again, defines the strength of the sanity presumption. A State may provide, for example, that whenever the defendant raises a claim of insanity by some quantum of credible evidence, the presumption disappears and the government must prove sanity to a specified degree of certainty (whether beyond reasonable doubt or something less). See, *e.g.*, *Commonwealth* v. *Keita*, 429 Mass. 843, 846, 712 N. E. 2d 65, 68 (1999). Or a jurisdiction may place the burden of persuasion on a defendant to prove insanity as the appli-

cable law defines it, whether by a preponderance of the evidence or to some more convincing degree, see Ariz. Rev. Stat. Ann. §13–502(C) (West 2001); *Leland*, 343 U. S., at 798. In any case, the defendant's burden defines the presumption of sanity, whether that burden be to burst a bubble or to show something more.

3

The third principle implicated by Clark's argument is a defendant's right as a matter of simple due process to present evidence favorable to himself on an element that must be proven to convict him.[39] As already noted, evidence tending to show that a defendant suffers from mental disease and lacks capacity to form *mens rea* is relevant to rebut evidence that he did in fact form the required *mens rea* at the time in question; this is the reason that Clark claims a right to require the factfinder in this case to consider testimony about his mental illness and his incapacity directly, when weighing the persuasiveness of other evidence tending to show *mens rea*, which the prosecution has the burden to prove.

As Clark recognizes, however, the right to introduce relevant evidence can be curtailed if there is a good reason for doing that. "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or poten-

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[39] Clark's argument assumes that Arizona's rule is a rule of evidence, rather than a redefinition of *mens rea*, see *Montana* v. *Egelhoff*, 518 U. S. 37, 58–59 (1996) (GINSBURG, J., concurring in judgment); *id.*, at 71 (O'Connor, J., dissenting). We have no reason to view the rule otherwise, and on this assumption, it does not violate due process, see *infra*, at 31–39.

tial to mislead the jury." *Holmes* v. *South Carolina*, 547 U. S. ___, ___ (2006) (slip op., at 6); see *Crane* v. *Kentucky*, 476 U. S. 683, 689–690 (1986) (permitting exclusion of evidence that "poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'" (quoting *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986))); see also *Egelhoff*, 518 U. S. 37; *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). And if evidence may be kept out entirely, its consideration may be subject to limitation, which Arizona claims the power to impose here. State law says that evidence of mental disease and incapacity may be introduced and considered, and if sufficiently forceful to satisfy the defendant's burden of proof under the insanity rule it will displace the presumption of sanity and excuse from criminal responsibility. But mental-disease and capacity evidence may be considered only for its bearing on the insanity defense, and it will avail a defendant only if it is persuasive enough to satisfy the defendant's burden as defined by the terms of that defense. The mental-disease and capacity evidence is thus being channeled or restricted to one issue and given effect only if the defendant carries the burden to convince the factfinder of insanity; the evidence is not being excluded entirely, and the question is whether reasons for requiring it to be channeled and restricted are good enough to satisfy the standard of fundamental fairness that due process requires. We think they are.

E

1

The first reason supporting the *Mott* rule is Arizona's authority to define its presumption of sanity (or capacity or responsibility) by choosing an insanity definition, as discussed in Part II, *supra*, and by placing the burden of persuasion on defendants who claim incapacity as an excuse from customary criminal responsibility. No one, certainly not Clark here, denies that a State may place a

burden of persuasion on a defendant claiming insanity, see *Leland, supra*, at 797–799 (permitting a State, consistent with due process, to require the defendant to bear this burden). And Clark presses no objection to Arizona's decision to require persuasion to a clear and convincing degree before the presumption of sanity and normal responsibility is overcome. See Brief for Petitioner 18, n. 25.

But if a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial. Yet, as we have explained, just such an opportunity would be available if expert testimony of mental disease and incapacity could be considered for whatever a factfinder might think it was worth on the issue of *mens rea*.[40] As we mentioned, the presumption of sanity would then be only as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about *mens rea* for the crime charged; once reasonable doubt was found, acquittal would be required, and the standards established for the defense of insanity would go by the boards.

Now, a State is of course free to accept such a possibility in its law. After all, it is free to define the insanity defense by treating the presumption of sanity as a bursting bubble, whose disappearance shifts the burden to the prosecution to prove sanity whenever a defendant presents any credible evidence of mental disease or incapacity. In States with this kind of insanity rule, the legislature may well be willing to allow such evidence to be considered on the *mens rea* element for whatever the

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[40] Cf. *post*, at 3 (KENNEDY, J., dissenting) ("The psychiatrist's explanation of Clark's condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting. Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia").

factfinder thinks it is worth. What counts for due process, however, is simply that a State that wishes to avoid a second avenue for exploring capacity, less stringent for a defendant, has a good reason for confining the consideration of evidence of mental disease and incapacity to the insanity defense.

It is obvious that Arizona's *Mott* rule reflects such a choice. The State Supreme Court pointed out that the State had declined to adopt a defense of diminished capacity (allowing a jury to decide when to excuse a defendant because of greater than normal difficulty in conforming to the law).[41] The court reasoned that the State's choice would be undercut if evidence of incapacity could be considered for whatever a jury might think sufficient to raise a reasonable doubt about *mens rea*, even if it did not show insanity. 187 Ariz., at 541, 931 P. 2d, at 1051. In other words, if a jury were free to decide how much evidence of mental disease and incapacity was enough to counter evidence of *mens rea* to the point of creating a reasonable doubt, that would in functional terms be analogous to allowing jurors to decide upon some degree of diminished capacity to obey the law, a degree set by them, that would

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[41] Though the term "diminished capacity" has been given different meanings, see, *e.g.*, Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & C. 1 (1984) ("The diminished capacity doctrine allows a criminal defendant to introduce evidence of mental abnormality at trial either to negate a mental element of the crime charged, thereby exonerating the defendant of that charge, or to reduce the degree of crime for which the defendant may be convicted, even if the defendant's conduct satisfied all the formal elements of a higher offense"), California, a jurisdiction with which the concept has traditionally been associated, understood it to be simply a "'showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication.'" *People* v. *Berry*, 18 Cal. 3d 509, 517, 556 P. 2d 777, 781 (1976) (in banc) (quoting *People* v. *Castillo*, 70 Cal. 2d 264, 270, 449 P. 2d 449, 452 (1969); emphasis deleted), abrogated by Cal. Penal Code Ann. §§25(a), 28(a)–(b), 29 (West 1999 and Supp. 2006).

prevail as a stand-alone defense.[42]

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A State's insistence on preserving its chosen standard of legal insanity cannot be the sole reason for a rule like *Mott*, however, for it fails to answer an objection the dissent makes in this case. See *post*, at 10–18 (opinion of KENNEDY, J.). An insanity rule gives a defendant already found guilty the opportunity to excuse his conduct by showing he was insane when he acted, that is, that he did not have the mental capacity for conventional guilt and criminal responsibility. But, as the dissent argues, if the same evidence that affirmatively shows he was not guilty by reason of insanity (or "guilty except insane" under Arizona law, Ariz. Rev. Stat. Ann. §13–502(A) (West 2001)) also shows it was at least doubtful that he could form *mens rea*, then he should not be found guilty in the first place; it thus violates due process when the State impedes him from using mental-disease and capacity evidence directly to rebut the prosecution's evidence that he did form *mens rea*.

Are there, then, characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Ari-

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[42] It is beyond question that Arizona may preclude such a defense, see *Fisher* v. *United States*, 328 U. S. 463, 466–476 (1946), and there is no doubt that the Arizona Legislature meant to do so, see Ariz. Rev. Stat. Ann. §13–502(A) (West 2001) ("Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct").

zona, a defendant has the burden of persuasion? We think there are: in the controversial character of some categories of mental disease, in the potential of mental-disease evidence to mislead, and in the danger of according greater certainty to capacity evidence than experts claim for it.

To begin with, the diagnosis may mask vigorous debate within the profession about the very contours of the mental disease itself. See, *e.g.*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxxiii (4th ed. text rev. 2000) (hereinafter DSM–IV–TR) ("DSM–IV reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication. New knowledge generated by research or clinical experience will undoubtedly lead to an increased understanding of the disorders included in DSM–IV, to the identification of new disorders, and to the removal of some disorders in future classifications. The text and criteria sets included in DSM–IV will require reconsideration in light of evolving new information"); P. Caplan, They Say You're Crazy: How the World's Most Powerful Psychiatrists Decide Who's Normal (1995) (criticism by former consultant to the DSM against some of the DSM's categories). And Members of this Court have previously recognized that the end of such debate is not imminent. See *Jones*, 463 U. S., at 364–365, n. 13 ("'The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment'" (quoting *Greenwood* v. *United States*, 350 U. S. 366, 375 (1956))); *Powell* v. *Texas*, 392 U. S. 514, 537 (1968) (plurality opinion) ("It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear . . . to doctors"). Though we certainly do not "condem[n mental-disease evidence] wholesale", Brief for American Psychiatric Association et al. as *Amici Curiae* 15, the consequence of this professional ferment is a general

caution in treating psychological classifications as predicates for excusing otherwise criminal conduct.

Next, there is the potential of mental-disease evidence to mislead jurors (when they are the factfinders) through the power of this kind of evidence to suggest that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all. Even when a category of mental disease is broadly accepted and the assignment of a defendant's behavior to that category is uncontroversial, the classification may suggest something very significant about a defendant's capacity, when in fact the classification tells us little or nothing about the ability of the defendant to form *mens rea* or to exercise the cognitive, moral, or volitional capacities that define legal sanity.[43] See DSM–IV–TR xxxii–xxxiii ("When the DSM–IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM–IV mental disorder is not sufficient to establish the existence for legal purposes of . . . 'mental diseas[e]' or 'mental defect.' In determining whether an individual meets a specified legal standard (e.g., for . . . criminal responsibility . . .), additional information is usually required beyond that contained in the DSM–IV diagnosis"). The limits of the utility of a professional

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[43] Our observation about the impact of mental-disease evidence on understandings of capacity in no way undermines the assertion by the American Psychiatric Association, the American Psychological Association, and the American Academy of Psychiatry in this case that "[e]xpert evidence of mental disorders . . . is . . . relevant to the mental-state issues raised by *mens rea* requirements." Brief for American Psychiatric Association et al. as *Amici Curiae* 15.

disease diagnosis are evident in the dispute between the two testifying experts in this case; they agree that Clark was schizophrenic, but they come to opposite conclusions on whether the mental disease in his particular case left him bereft of cognitive or moral capacity. Evidence of mental disease, then, can easily mislead; it is very easy to slide from evidence that an individual with a professionally recognized mental disease is very different, into doubting that he has the capacity to form *mens rea*, whereas that doubt may not be justified. And of course, in the cases mentioned before, in which the categorization is doubtful or the category of mental disease is itself subject to controversy, the risks are even greater that opinions about mental disease may confuse a jury into thinking the opinions show more than they do. Because allowing mental-disease evidence on *mens rea* can thus easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a defendant may be assigned the burden of persuasion.

There are, finally, particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity: on whether the mental disease rendered a particular defendant incapable of the cognition necessary for moral judgment or *mens rea* or otherwise incapable of understanding the wrongfulness of the conduct charged. Unlike observational evidence bearing on *mens rea*, capacity evidence consists of judgment, and judgment fraught with multiple perils: a defendant's state of mind at the crucial moment can be elusive no matter how conscientious the enquiry, and the law's categories that set the terms of the capacity judgment are not the categories of psychology that govern the expert's professional thinking. Although such capacity judgments may be given in the utmost good faith, their potentially tenuous character is indicated by the candor of the defense

expert in this very case. Contrary to the State's expert, he testified that Clark lacked the capacity to appreciate the circumstances realistically and to understand the wrongfulness of what he was doing, App. 48–49, but he said that "no one knows exactly what was on [his] mind" at the time of the shooting, *id.*, at 48. And even when an expert is confident that his understanding of the mind is reliable, judgment addressing the basic categories of capacity requires a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility. See Insanity Defense Work Group, American Psychiatric Association Statement on the Insanity Defense, 140 Am. J. Psychiatry 681, 686 (1983), reprinted in 2 The Role of Mental Illness in Criminal Trials 117, 122 (J. Moriarty ed. 2001) ("The American Psychiatric Association is not opposed to legislatures restricting psychiatric testimony about the . . . ultimate legal issues concerning the insanity defense. . . . When . . . 'ultimate issue' questions are formulated by the law and put to the expert witness who must then say 'yea' or 'nay,' then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. . . . This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. These psychiatric disagreements . . . cause less than fully understanding juries or the public to conclude that psychiatrists cannot agree. In fact, in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder exhibited by the defendant at the time of the act" (emphasis in original; footnote omitted)); DSM–IV–TR

xxxii–xxxiii; P. Giannelli & E. Imwinkelried, Scientific Evidence §9–3(B), p. 286 (1986) ("[N]o matter how the test for insanity is phrased, a psychiatrist or psychologist is no more qualified than any other person to give an opinion about whether a particular defendant's mental condition satisfies the legal test for insanity"); cf. R. Slovenko, Psychiatry and Criminal Culpability 55 (1995) ("The scope of the DSM is wide-ranging and includes 'conduct disorders' but 'evil' is not mentioned"). In sum, these empirical and conceptual problems add up to a real risk that an expert's judgment in giving capacity evidence will come with an apparent authority that psychologists and psychiatrists do not claim to have. We think that this risk, like the difficulty in assessing the significance of mental-disease evidence, supports the State's decision to channel such expert testimony to consideration on the insanity defense, on which the party seeking the benefit of this evidence has the burden of persuasion.

It bears repeating that not every State will find it worthwhile to make the judgment Arizona has made, and the choices the States do make about dealing with the risks posed by mental-disease and capacity evidence will reflect their varying assessments about the presumption of sanity as expressed in choices of insanity rules.[44] The point here simply is that Arizona has sensible reasons to assign the risks as it has done by channeling the evidence.[45]

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[44] A State in which the burden of persuasion as to a defendant's sanity lies with the prosecution might also be justified in restricting mental-disease and capacity evidence to insanity determinations owing to the potential of mental-disease evidence to mislead and the risk of misjudgment inherent in capacity evidence. We need not, in the context of this case, address that issue.

[45] Arizona's rule is supported by a further practical reason, though not as weighty as those just considered. As mentioned before, if substantial mental-disease and capacity evidence is accepted as rebutting *mens rea* in a given case, the affirmative defense of insanity will proba-

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Arizona's rule serves to preserve the State's chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors.[46] For these reasons, there is no violation of due process under *Chambers* and its progeny, and no cause to claim that channeling evidence on mental disease and capacity offends any "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson*, 432 U. S., at 202 (quoting *Speiser*, 357 U. S., at 523).

* * *

The judgment of the Court of Appeals of Arizona is, accordingly, affirmed.

*It is so ordered.*

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bly not be reached or ruled upon: the defendant will simply be acquitted (or perhaps convicted of a lesser included offense). If an acquitted defendant suffers from a mental disease or defect that makes him dangerous, he will neither be confined nor treated psychiatrically unless a judge so orders after some independent commitment proceeding. But if a defendant succeeds in showing himself insane, Arizona law (and presumably that of every other State with an insanity rule) will require commitment and treatment as a consequence of that finding without more. It makes sense, then, to channel capacity evidence to the issue structured to deal with mental incapacity when such a claim is raised successfully. See, *e.g.*, *Jones*, 463 U. S., at 368 ("The purpose of commitment following an insanity acquittal . . . is to treat the individual's mental illness and protect him and society from his potential dangerousness").

[46] The rule also deals in a practical way with those whose insanity has been shown to make them dangerous to others. See n. 45, *supra*.

# SUPREME COURT OF THE UNITED STATES

No. 05–5966

ERIC MICHAEL CLARK, PETITIONER *v.* ARIZONA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

[June 29, 2006]

JUSTICE BREYER, concurring in part and dissenting in part.

As I understand the Court's opinion, it distinguishes among three categories of evidence related to insanity: (1) fact-related evidence as to the defendant's specific state of mind at the time of the crime, *e.g.*, evidence that shows he thought the policeman was not a human being; (2) expert opinion evidence that the defendant suffered from a mental disease that would have affected his capacity to form an intent to kill a policeman, *e.g.*, that he suffers from a disease of a kind where powerful voices command the sufferer to kill; and (3) expert opinion evidence that the defendant was legally insane, *e.g.*, evidence that he did not know right from wrong. *Ante*, at 16–18.

I agree with the Court's basic categorization. I also agree that the Constitution permits a State to provide for consideration of the second and third types of evidence solely in conjunction with the insanity defense. A State might reasonably fear that, without such a rule, the types of evidence as to intent would become confused in the jury's mind, indeed that in some cases the insanity question would displace the intent question as the parties litigate both simultaneously.

Nonetheless, I believe the distinction among these kinds of evidence will be unclear in some cases. And though I accept the majority's reading of the record, I

remain concerned as to whether the lower courts, in setting forth and applying *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046 (en banc), cert. denied, 520 U. S. 1234 (1997), focused with sufficient directness and precision upon the distinction.

Consequently, I would remand this case so that Arizona's courts can determine whether Arizona law, as set forth in *Mott* and other cases, is consistent with the distinction the Court draws and whether the trial court so applied Arizona law here. I would also reserve the question (as I believe the Court has done) as to the burden of persuasion in a case where the defendant produces sufficient evidence of the second kind as to raise a reasonable doubt suggesting that he suffered from a mental illness so severe as to prevent him from forming any relevant intent at all.

For this reason, I dissent only from Parts III–B and III–C of the Court's opinion and the ultimate disposition of this case, and I join the remainder.

# SUPREME COURT OF THE UNITED STATES

No. 05–5966

ERIC MICHAEL CLARK, PETITIONER *v.* ARIZONA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

[June 29, 2006]

JUSTICE KENNEDY, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

In my submission the Court is incorrect in holding that Arizona may convict petitioner Eric Clark of first-degree murder for the intentional or knowing killing of a police officer when Clark was not permitted to introduce critical and reliable evidence showing he did not have that intent or knowledge. The Court is wrong, too, when it concludes the issue cannot be reached because of an error by Clark's counsel. Its reasons and conclusions lead me to file this respectful dissent.

Since I would reverse the judgment of the Arizona Court of Appeals on this ground, and the Arizona courts might well alter their interpretation of the State's criminal responsibility statute were my rationale to prevail, it is unnecessary for me to address the argument that Arizona's definition of insanity violates due process.

## I

Clark claims that the trial court erred in refusing to consider evidence of his chronic paranoid schizophrenia in deciding whether he possessed the knowledge or intent required for first-degree murder. Seizing upon a theory invented here by the Court itself, the Court narrows Clark's claim so he cannot raise the point everyone else thought was involved in the case. The Court says the only

issue before us is whether there is a right to introduce mental-disease evidence or capacity evidence, not a right to introduce observation evidence. See *ante,* at 15–25. This restructured evidentiary universe, with no convincing authority to support it, is unworkable on its own terms. Even were that not so, however, the Court's tripartite structure is something not addressed by the state trial court, the state appellate court, counsel on either side in those proceedings, or the briefs the parties filed with us. The Court refuses to consider the key part of Clark's claim because his counsel did not predict the Court's own invention. It is unrealistic, and most unfair, to hold that Clark's counsel erred in failing to anticipate so novel an approach. If the Court is to insist on its approach, at a minimum the case should be remanded to determine whether Clark is bound by his counsel's purported waiver.

The Court's error, of course, has significance beyond this case. It adopts an evidentiary framework that, in my view, will be unworkable in many cases. The Court classifies Clark's behavior and expressed beliefs as observation evidence but insists that its description by experts must be mental-disease evidence or capacity evidence. See *ante,* at 16–18. These categories break down quickly when it is understood how the testimony would apply to the question of intent and knowledge at issue here. The most common type of schizophrenia, and the one Clark suffered from, is paranoid schizophrenia. See P. Berner et al., Diagnostic Criteria for Functional Psychoses 37 (2d ed. 1992). The existence of this functional psychosis is beyond dispute, but that does not mean the lay witness understands it or that a disputed issue of fact concerning its effect in a particular instance is not something for the expert to address. Common symptoms of the condition are delusions accompanied by hallucinations, often of the auditory type, which can cause disturbances of perception. *Ibid.* Clark's expert testified that people with schizophrenia

often play radios loudly to drown out the voices in their heads. See App. 32. Clark's attorney argued to the trial court that this, rather than a desire to lure a policeman to the scene, explained Clark's behavior just before the killing. *Id.*, at 294–295. The observation that schizophrenics play radios loudly is a fact regarding behavior, but it is only a relevant fact if Clark has schizophrenia.

Even if this evidence were, to use the Court's term, mental-disease evidence, because it relies on an expert opinion, what would happen if the expert simply were to testify, without mentioning schizophrenia, that people with Clark's symptoms often play the radio loudly? This seems to be factual evidence, as the term is defined by the Court, yet it differs from mental-disease evidence only in forcing the witness to pretend that no one has yet come up with a way to classify the set of symptoms being described. More generally, the opinion that Clark had paranoid schizophrenia—an opinion shared by experts for both the prosecution and defense—bears on efforts to determine, as a factual matter, whether he knew he was killing a police officer. The psychiatrist's explanation of Clark's condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting. Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 299 (4th ed. text rev. 2000) ("The characteristic symptoms of Schizophrenia involve a range of cognitive and emotional dysfunctions that include perception"); *ibid.* (Symptoms include delusions, which are "erroneous beliefs that usually involve a misinterpretation of perceptions or experiences"). The mental-disease evidence at trial was also intertwined with the observation evidence because it lent needed credibility. Clark's parents and friends testified Clark thought the people in his town were aliens

trying to kill him. These claims might not be believable without a psychiatrist confirming the story based on his experience with people who have exhibited similar behaviors. It makes little sense to divorce the observation evidence from the explanation that makes it comprehensible.

Assuming the Court's tripartite structure were feasible, the Court is incorrect when it narrows Clark's claim to exclude any concern about observation evidence. In deciding Clark's counsel failed to raise this issue, the Court relies on a series of perceived ambiguities regarding how the claim fits within the Court's own categories. See *ante*, at 15–25. The Court cites no precedent for construing these ambiguities against the claimant and no prudential reason for ignoring the breadth of Clark's claim. It is particularly surprising that the Court does so to the detriment of a criminal defendant asserting the fundamental challenge that the trier of fact refused to consider critical evidence showing he is innocent of the crime charged.

The alleged ambiguities are, in any event, illusory. The evidence at trial addressed more than the question of general incapacity or opinions regarding mental illness; it went further, as it included so-called observation evidence relevant to Clark's mental state at the moment he shot the officer. There was testimony, for example, that Clark thought the people in his town, particularly government officials, were not human beings but aliens who were trying to kill him. See App. 119–121, 131–132, 192–197, 249–256; Tr. of Bench Trial in No. CR–2000–538, pp. 110–112, 131–132, 136, 226–228 (Aug. 20, 2003); *id.*, at 24–25, 59–60 (Aug. 21, 2003). The Court recognizes the existence of this essential observation evidence. See *ante*, at 16–17.

The Court holds, nonetheless, that "we cannot be sure" whether the trial court failed to consider this evidence. *Ante*, at 24. It is true the trial court ruling was not perfectly clear. Its language does strongly suggest, though, that it did not consider any of this testimony in deciding

whether Clark had the knowledge or intent required for first-degree murder. After recognizing that "much of the evidence that [the defense is] going to be submitting, in fact all of it, as far as I know . . . that has to do with the insanity could also arguably be made . . . as to form and intent and his capacity for the intent," the court concluded "we will be focusing, as far as I'm concerned, strictly on the insanity defense." App. 9. In announcing its verdict, the trial court did not mention any of the mental-illness evidence, observation or otherwise, in deciding Clark's guilt. *Id.*, at 331–335. The most reasonable assumption, then, would seem to be that the trial court did not consider it, and the Court does not hold otherwise. See *ante*, at 20.

Clark's objection to this refusal by the trier of fact to consider the evidence as it bore on his key defense was made at all stages of the proceeding. In his post-trial motion to vacate the judgment, Clark argued that "prohibiting consideration of *any* evidence reflecting upon a mentally ill criminal defendant's ability to form the necessary *mens rea* violates due process." Record, Doc. 406, p. 8. Clark pressed the same argument in the Arizona Court of Appeals. See Appellant's Opening Brief in No. 1CA–CR–03–0851 etc., pp. 46–52 (hereinafter Appellant's Opening Brief). He also noted that the trial judge had erred in refusing to consider non-expert testimony—presumably what the Court would call observation evidence—on Clark's mental illness. *Id.*, at 47–48. ("The trial court therefore violated [Clark's] right to present a defense because [the] court refused to consider *any evidence*, including the multiple testimonials of *lay* witnesses . . . in deciding whether he could form the requisite *mens rea*"). The appeals court decided the issue on the merits, holding that the trial court was correct not to consider the evidence of mental illness in determining whether Clark had the *mens rea* for first-degree murder. See App. 351–353. It offered no distinction at all between observation or

mental-disease evidence.

Notwithstanding the appeals court's decision, the Court states that the issue was not clearly presented to the state courts. See *ante*, at 21–24. According to the Court, Clark only raised an objection based on *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046 (1997) (en banc), see *ante*, at 21–24, and *Mott*'s holding was limited to the exclusion of mental-disease and capacity evidence, see *ante*, at 19. The Court is incorrect, and on both counts.

First, Clark's claim goes well beyond an objection to *Mott*. In fact, he specifically attempted to distinguish *Mott* by noting that the trial court in this case refused to consider all evidence of mental illness. See Record, Doc. 406, at 8; see also Appellant's Opening Brief 48. The Court notices these arguments but criticizes Clark's counsel for not being specific about the observation evidence he wanted the trial court to consider. See *ante*, at 22. There was no reason, though, for Clark's counsel to believe additional specificity was required, since there was no evident distinction in Arizona law between observation evidence and mental-disease testimony.

Second, *Mott*'s holding was not restricted to mental-disease evidence. The Arizona Supreme Court did not refer to any distinction between observation and mental-disease evidence, or lay and expert testimony. Its holding was stated in broad terms: "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." 187 Ariz., at 541, 931 P. 2d, at 1051; see *id.*, at 540, 931 P. 2d, at 1050 ("The legislature's decision . . . evidences its rejection of the use of psychological testimony to challenge the *mens rea* element of a crime"). The Court attempts to divine a fact/opinion distinction in *Mott* based on *Mott*'s distinguishing a case, *State* v. *Christensen*, 129 Ariz. 32, 628 P. 2d 580 (1981) (in banc), where evidence about behavioral tendencies was deemed admissible. See

*ante,* at 19. *Christensen*, though, also addressed an expert opinion; the difference was that the evidence there concerned a "character trait of acting reflexively in response to stress," not a mental illness. *Mott, supra,* at 544, 931 P. 2d, at 1054. Since the Court recognizes the Arizona Court of Appeals relied on *Mott,* the expansive rule of exclusion in *Mott*—without any suggestion of a limitation depending on the kind of evidence—should suffice for us to reach the so-called observation-evidence issue. Even if, as the Court contends, see *ante,* at 15, *Mott* is limited to expert testimony, the Court's categories still do not properly interpret *Mott,* because the Court's own definition of observation evidence includes some expert testimony, see *ante,* at 17.

It makes no difference that in the appeals court Clark referred to the issue as inability to form knowledge or intent. See Appellant's Opening Brief 46–52. He did not insist on some vague, general incapacity. He stated, instead, that he "suffered from a major mental illness and was psychotic at the time of the offense." *Id.,* at 48. Even if Clark's arguments were insufficient to apprise the state court of the argument, "[o]ur traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *National Railroad Passenger Corporation,* 513 U. S. 374, 379 (1995) (quoting *Yee* v. *Escondido,* 503 U. S. 519, 534 (1992)). The claim is clear. Though it seems to be obscure to this Court, it was understood by the Arizona Court of Appeals, which stated: "Clark argues that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder." App. 351. When the question is what the state court held, it is not instructive for this Court to recast the words the state court used.

The razor-thin distinction the Court draws between

evidence being used to show incapacity and evidence being used to show lack of *mens rea* directly does not identify two different claims. Clark's single claim, however characterized, involves the use of the same mental-illness evidence to decide whether he had the requisite knowledge or intent. The various ways in which the evidence is relevant in disproving *mens rea* hardly qualify as separate claims. The new arguments allowed in *Lebron* and *Yee*, by comparison, were far more disconnected from the initial bases for the alleged violations. See *Lebron, supra*, at 378, 379 (for purposes of showing state action, petitioner could argue that Amtrak was a Government entity even though he argued below only that it was a private entity with close connections to Government entities, because the claim was simply "that Amtrak did not accord him the rights it was obliged to provide by the First Amendment"); *Yee, supra*, at 534, 535 (petitioners could argue that an ordinance constituted a regulatory taking, even though they arguably asserted in the Court of Appeals only a physical taking, because the claim was simply "that the ordinance effects an unconstitutional taking"). If we give this latitude to litigants in civil cases, surely we must do so here. Furthermore, to the extent any ambiguity remains on whether the claim was raised, the proper course is to remand. See *Bradshaw* v. *Richey*, 546 U. S. ___, ___ (2005) (slip op., at 6) *(per curiam)*. Unless the state court clearly decides an issue on state-law grounds, which the Court does not contend occurred here, there is no bar to our review of the federal question. See *Harris* v. *Reed*, 489 U. S. 255, 261–262 (1989).

Before this Court Clark framed the issue in broad terms that encompass the question whether the evidence of his mental illness should have been considered to show he did not at the time of the offense have the knowledge or intent to shoot a police officer. See Brief for Petitioner i ("Questions Presented for Review: (1) Whether Arizona's blanket

exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?"), 22 ("Here, the trial court held that under the *Mott* rule it was obliged to find as a fact that [Clark] knew he was shooting a police officer to death—a necessary factual element of the only form of first degree murder charged against [Clark]—while simultaneously refusing to consider [Clark's] evidence that an acute episode of his chronic paranoid schizophrenic illness prevented him from actually having that knowledge" (emphasis omitted)), 31–32 (the Arizona courts erred in holding Clark "could be punished as though he had this knowledge and intent although he may not in fact have had either"); Reply Brief for Petitioner 3 (challenging the trial judge's refusal "to give any consideration to the mental-illness evidence in making his factual findings as to whether [Clark] did or did not act with the state of mind required for a first-degree murder conviction"). An entire section of Clark's opening brief argues that the evidence of mental illness should have been considered to rebut the prosecution's inference of knowledge or intent from the factual circumstances of the crime. See Brief for Petitioner 13–21. This line of argument concerns facts of behavior and amounts to more than a claim of general incapacity.

Clark seeks resolution of issues that can be complex and somewhat overlapping. In the end, however, we must decide whether he had the right to introduce evidence showing he lacked the intent or knowledge the statute itself sets forth in describing a basic element of the crime. Clark has preserved this issue at all stages, including in this Court.

II

Clark was charged with first-degree murder for the shoot-

ing of Officer Jeffrey Moritz. "A person commits first-degree murder if," as relevant here, "[i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty." Ariz. Rev. Stat. Ann. §13–1105(A)(3) (West Supp. 2005). Clark challenges the trial court's refusal to consider any evidence of mental illness, from lay or expert testimony, in determining whether he acted with the knowledge or intent element of the crime. See App. 9; see also *Mott*, 187 Ariz., at 541, 931 P. 2d, at 1051.

States have substantial latitude under the Constitution to define rules for the exclusion of evidence and to apply those rules to criminal defendants. See *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998). This authority, however, has constitutional limits. "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'" *Holmes* v. *South Carolina*, 547 U. S. ___, ___ (2006) (slip op., at 4) (quoting *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986), in turn quoting *California* v. *Trombetta*, 467 U. S. 479, 485 (1984)). "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are '"arbitrary" or "disproportionate to the purposes they are designed to serve."'" *Holmes*, *supra*, at ___ (slip op., at 4) (quoting *Scheffer*, *supra*, at 308, in turn quoting *Rock* v. *Arkansas*, 483 U. S. 44, 58, 56 (1987)).

The central theory of Clark's defense was that his schizophrenia made him delusional. He lived in a universe where the delusions were so dominant, the theory was, that he had no intent to shoot a police officer or knowledge he was doing so. It is one thing to say he acted with intent or knowledge to pull the trigger. It is quite

another to say he pulled the trigger to kill someone he knew to be a human being and a police officer. If the trier of fact were to find Clark's evidence sufficient to discount the case made by the State, which has the burden to prove knowledge or intent as an element of the offense, Clark would not be guilty of first-degree murder under Arizona law.

The Court attempts to diminish Clark's interest by treating mental-illness evidence as concerning only "judgment," rather than fact. *Ante,* at 36. This view appears to derive from the Court's characterization of Clark's claim as raising only general incapacity. See *ibid.* This is wrong for the reasons already discussed. It fails to recognize, moreover, the meaning of the offense element in question here. The *mens rea* element of intent or knowledge may, at some level, comprise certain moral choices, but it rests in the first instance on a factual determination. That is the fact Clark sought to put in issue. Either Clark knew he was killing a police officer or he did not.

The issue is not, as the Court insists, whether Clark's mental illness acts as an "excuse from customary criminal responsibility," *ante,* at 30, but whether his mental illness, as a factual matter, made him unaware that he was shooting a police officer. If it did, Clark needs no excuse, as then he did not commit the crime as Arizona defines it. For the elements of first-degree murder, where the question is knowledge of particular facts—that one is killing a police officer—the determination depends not on moral responsibility but on empirical fact. Clark's evidence of mental illness had a direct and substantial bearing upon what he knew, or thought he knew, to be the facts when he pulled the trigger; this lay at the heart of the matter.

The trial court's exclusion was all the more severe because it barred from consideration on the issue of *mens rea* all this evidence, from any source, thus preventing Clark from showing he did not commit the crime as defined by

Arizona law. Quite apart from due process principles, we have held that a bar of this sort can be inconsistent with the Confrontation Clause. See *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986). In *Van Arsdall* the Court held a state court erred in making a ruling that "prohibited *all* inquiry into" an event. *Id.*, at 679. At issue was a line of defense questioning designed to show the bias of a prosecution witness. In the instant case the ruling in question bars from consideration all testimony from all witnesses necessary to present the argument that was central to the whole case for the defense: a challenge to the State's own proof on an element of the crime. The Due Process and Compulsory Process Clauses, and not the Confrontation Clause, may be the controlling standard; but the disability imposed on the accused is every bit as substantial and pervasive here as it was in *Van Arsdall*.

Arizona's rule is problematic because it excludes evidence no matter how credible and material it may be in disproving an element of the offense. The Court's cases have noted the potential arbitrariness of *per se* exclusions and, on this rationale, have invalidated various state prohibitions. See *Holmes*, *supra*, at ___ (slip op., at 9) (rule excluding, in certain cases, evidence that a third party may have committed the crime "even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues"); *Rock*, *supra*, at 56 (rule excluding all hypnotically refreshed testimony "operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced"); *Washington* v. *Texas*, 388 U. S. 14, 22 (1967) (rule excluding accomplice testimony "prevent[s] whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief").

This is not to suggest all general rules on the exclusion of certain types of evidence are invalid. If the rule does not substantially burden the defense, then it is likely permissible. See *Scheffer*, 523 U. S., at 316–317 (upholding exclusion of polygraph evidence in part because this rule "does not implicate any significant interest of the accused"); *id.*, at 318 (KENNEDY, J., concurring in part and concurring in judgment) ("[S]ome later case might present a more compelling case for introduction of the testimony than this one does"). Where, however, the burden is substantial, the State must present a valid reason for its *per se* evidentiary rule.

In the instant case Arizona's proposed reasons are insufficient to support its categorical exclusion. While the State contends that testimony regarding mental illness may be too incredible or speculative for the jury to consider, this does not explain why the exclusion applies in all cases to all evidence of mental illness. "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Rock*, 483 U. S., at 61. States have certain discretion to bar unreliable or speculative testimony and to adopt rules to ensure the reliability of expert testimony. Arizona has done so, and there is no reason to believe its rules are insufficient to avoid speculative evidence of mental illness. See Ariz. Rules of Evid. 403, 702 (West 2005). This is particularly true because Arizona applies its usual case-by-case approach to permit admission of evidence of mental illness for a variety of other purposes. See, *e.g.*, *State* v. *Lindsey*, 149 Ariz. 472, 474–475, 720 P. 2d 73, 74–75 (1986) (en banc) (psychological characteristics of molestation victims); *State* v. *Hamilton*, 177 Ariz. 403, 408–410, 868 P. 2d 986, 991–993 (App. 1993) (psychological evidence of child abuse accommodation syndrome); *Horan* v. *Indus. Comm'n*, 167 Ariz. 322, 325–326, 806 P. 2d 911, 914–915 (App. 1991) (psychiatric

testimony regarding neurological deficits).

The risk of jury confusion also fails to justify the rule. The State defends its rule as a means to avoid the complexities of determining how and to what degree a mental illness affects a person's mental state. The difficulty of resolving a factual issue, though, does not present a sufficient reason to take evidence away from the jury even when it is crucial for the defense. "We have always trusted juries to sort through complex facts in various areas of law." *United States* v. *Booker*, 543 U. S. 220, 289 (2005) (STEVENS, J., dissenting in part). Even were the risk of jury confusion real enough to justify excluding evidence in most cases, this would provide little basis for prohibiting all evidence of mental illness without any inquiry into its likely effect on the jury or its role in deciding the linchpin issue of knowledge and intent. Indeed, Arizona has a rule in place to serve this very purpose. See Ariz. Rule of Evid. 403.

Even assuming the reliability and jury-confusion justifications were persuasive in some cases, they would not suffice here. It does not overcome the constitutional objection to say that an evidentiary rule that is reasonable on its face can be applied as well to bar significant defense evidence without any rational basis for doing so. In *Van Arsdall*, for example, the Court rejected the application of Delaware Rule of Evidence 403, which allows relevant evidence to be excluded where its probative value is substantially outweighed by the risk of unfair prejudice or other harms to the trial process. 475 U. S., at 676, and n. 2. While the Rule is well established and designed for a legitimate function, the Constitution prevented an application that deprived the defendant of all inquiry into an important issue. *Id.*, at 679. Other cases have applied this same case-specific analysis in deciding the legitimacy of an exclusion. See, *e.g.*, *Rock*, *supra*, at 62 (the "circumstances present an argument for admissibility of petitioner's testimony in this particular case, an argument that must be considered by the

trial court"); *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"); cf. *Scheffer*, 523 U. S., at 318 (KENNEDY, J., concurring in part and concurring in judgment).

The Court undertakes little analysis of the interests particular to this case. By proceeding in this way it devalues Clark's constitutional rights. The reliability rationale has minimal applicability here. The Court is correct that many mental diseases are difficult to define and the subject of great debate. See *ante*, at 33–34. Schizophrenia, however, is a well-documented mental illness, and no one seriously disputes either its definition or its most prominent clinical manifestations. The State's own expert conceded that Clark had paranoid schizophrenia and was actively psychotic at the time of the killing. See App. 254–257. The jury-confusion rationale, if it is at all applicable here, is the result of the Court's own insistence on conflating the insanity defense and the question of intent. Considered on its own terms, the issue of intent and knowledge is a straightforward factual question. A trier of fact is quite capable of weighing defense testimony and then determining whether the accused did or did not intend to kill or knowingly kill a human being who was a police officer. True, the issue can be difficult to decide in particular instances, but no more so than many matters juries must confront.

The Court says mental-illness evidence "can easily mislead," *ante*, at 36, and may "tel[l] us little or nothing about the ability of the defendant to form *mens rea*," *ante*, at 35. These generalities do not, however, show how relevant or misleading the evidence in this case would be (or explain why Arizona Rule of Evidence 403 is insufficient for weighing these factors). As explained above, the

evidence of Clark's mental illness bears directly on *mens rea*, for it suggests Clark may not have known he was killing a human being. It is striking that while the Court discusses at length the likelihood of misjudgment from placing too much emphasis on evidence of mental illness, see *ante*, at 33–38, it ignores the risk of misjudging an innocent man guilty from refusing to consider this highly relevant evidence at all. Clark's expert, it is true, said no one could know exactly what was on Clark's mind at the time of the shooting. See *ante*, at 37. The expert testified extensively, however, about the effect of Clark's delusions on his perceptions of the world around him, and about whether Clark's behavior around the time of the shooting was consistent with delusional thinking. This testimony was relevant to determining whether Clark knew he was killing a human being. It also bolstered the testimony of lay witnesses, none of which was deemed unreliable or misleading by the state courts.

For the same reasons, the Court errs in seeking support from the American Psychiatric Association's statement that a psychiatrist may be justifiably reluctant to reach legal conclusions regarding the defendant's mental state. See *ante*, at 37. In this very case, the American Psychiatric Association made clear that psychiatric evidence plays a crucial role regardless of whether the psychiatrist testifies on the ultimate issue: "Expert evidence of mental disorders, presented by qualified professionals and subject to adversarial testing, is both relevant to the mental-state issues raised by *mens rea* requirements and reliable. . . . Such evidence could not be condemned wholesale without unsettling the legal system's central reliance on such evidence." Brief for American Psychiatric Association et al. as *Amici Curiae* 15.

Contrary to the Court's suggestion, see *ante*, at 35–36, the fact that the state and defense experts drew different conclusions about the effect of Clark's mental illness on

his mental state only made Clark's evidence contested; it did not make the evidence irrelevant or misleading. The trial court was capable of evaluating the competing conclusions, as factfinders do in countless cases where there is a dispute among witnesses. In fact, the potential to mislead will be far greater under the Court's new evidentiary system, where jurors will receive observation evidence without the necessary explanation from experts.

The fact that mental-illness evidence may be considered in deciding criminal responsibility does not compensate for its exclusion from consideration on the *mens rea* elements of the crime. Cf. *ante*, at 33. The evidence addresses different issues in the two instances. Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the *mens rea* elements of the offense. While there may be overlap between the two issues, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney* v. *Wilbur*, 421 U. S. 684, 706 (1975) (Rehnquist, J., concurring).

Even if the analyses were equivalent, there is a different burden of proof for insanity than there is for *mens rea*. Arizona requires the defendant to prove his insanity by clear and convincing evidence. See Ariz. Rev. Stat. Ann. §13–502(C) (West 2001). The prosecution, however, must prove all elements of the offense beyond a reasonable doubt. See *Mullaney*, *supra*, at 703–704; *In re Winship*, 397 U. S. 358, 364 (1970). The shift in the burden on the criminal responsibility issue, while permissible under our precedent, see *Leland* v. *Oregon*, 343 U. S. 790 (1952), cannot be applied to the question of intent or knowledge without relieving the State of its responsibility to establish this element of the offense. See *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979) (jury instruction that had the effect of placing the burden on the defendant to disprove that he had

the requisite mental state violates due process). While evidentiary rules do not generally shift the burden impermissibly, where there is a right to have evidence considered on an element of the offense, the right is not respected by allowing the evidence to come in only on an issue for which the defendant bears the burden of proof. See *Cool* v. *United States*, 409 U. S. 100, 103 (1972) *(per curiam)* (jury instruction that allowed jury to consider accomplice's testimony only if it was true beyond a reasonable doubt "places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt"); *Martin* v. *Ohio*, 480 U. S. 228, 233–234 (1987) (State can shift the burden on a claim of self-defense, but if the jury were disallowed from considering self-defense evidence for purposes of deciding the elements of the offense, it "would relieve the State of its burden and plainly run afoul of *Winship*'s mandate"). By viewing the Arizona rule as creating merely a "presumption of sanity (or capacity or responsibility)," *ante*, at 30, rather than a presumption that the *mens rea* elements were not affected by mental illness, the Court fails to appreciate the implications for *Winship*.

The State attempts to sidestep the evidentiary issue entirely by claiming that its mental-illness exclusion simply alters one element of the crime. The evidentiary rule at issue here, however, cannot be considered a valid redefinition of the offense. Under the State's logic, a person would be guilty of first-degree murder if he knowingly or intentionally killed a police officer or committed the killing under circumstances that would show knowledge or intent but for the defendant's mental illness. To begin with, Arizona law does not say this. And if it did, it would be impermissible. States have substantial discretion in defining criminal offenses. In some instances they may provide that the accused has the burden of persuasion with respect to affirmative defenses. See *Patterson* v. *New*

*York*, 432 U. S. 197, 210 (1977). "But there are obviously constitutional limits beyond which the States may not go in this regard." *Ibid.* If it were otherwise, States could label all evidentiary exclusions as redefinitions and so evade constitutional requirements. There is no rational basis, furthermore, for criminally punishing a person who commits a killing without knowledge or intent only if that person has a mental illness. Cf. *Robinson* v. *California*, 370 U. S. 660, 666 (1962). The State attempts to bring the instant case within the ambit of *Montana* v. *Egelhoff*, 518 U. S. 37 (1996); but in *Egelhoff* the excluded evidence concerned voluntary intoxication, for which a person can be held responsible. Viewed either as an evidentiary rule or a redefinition of the offense, it was upheld because it "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences." *Id.*, at 50 (plurality opinion). An involuntary mental illness does not implicate this justification.

Future dangerousness is not, as the Court appears to conclude, see *ante*, at 38–39, n. 45, a rational basis for convicting mentally ill individuals of crimes they did not commit. Civil commitment proceedings can ensure that individuals who present a danger to themselves or others receive proper treatment without unfairly treating them as criminals. The State presents no evidence to the contrary, and the Court ought not to imply otherwise.

The State gains little support from *Fisher* v. *United States*, 328 U. S. 463 (1946). There the defendant requested an instruction from the trial court that the jury consider his mental deficiencies in determining his capacity for premeditation and deliberation. *Id.*, at 470. The Court noted that "[i]n view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process." *Id.*, at 466. This dictum may be attributable to the

fact that the cases recognizing a defendant's evidentiary rights and the prosecution's duty to prove all elements beyond a reasonable doubt were still decades away. It may also reflect the fact that the jury instructions as given did seem to allow the jury to consider evidence of mental deficiency if it disproved the elements of the offense. See *id.*, at 467, n. 3 (The jury instructions stated, "'It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if not guilty by reason of insanity, the defendant at most is guilty only of second degree murder or manslaughter'"). Even further ambiguity comes from the fact that the defense in *Fisher* concerned a claim that the petitioner was "mentally somewhat below the average" with a "psychopathic personality" of aggression. *Id.*, at 467. This general claim of mental deficiencies was relevant to the "theory of partial responsibility," *id.*, at 470, he wanted the jury to consider. Unlike the mental illness here, though, which concerns inadequacy of perception and information processing, the petitioner's claim may not have been relevant to *mens rea* unless *mens rea* were redefined to include an element of responsibility. *Fisher*'s language, then, does not control this case.

While Arizona's rule is not unique, either historically or in contemporary practice, this fact does not dispose of Clark's constitutional argument. To the extent *Fisher* may have suggested the contrary, subsequent cases make clear that while the existence of the rule in some jurisdictions is a significant factor to consider, see *Egelhoff, supra*, at 43 (plurality opinion), it is not dispositive for evaluation of a claim that the accused was foreclosed from introducing evidence crucial to the defense. The evidentiary exclusion of accomplice testimony the Court invalidated in *Washington* was, in fact, well established. See 388 U. S., at 21–22. The exclusion of hypnotically refreshed testimony likewise had some support when the Court held it

unconstitutional as applied to a defendant's own testimony. *Rock*, 483 U. S., at 57. While 13 States still impose significant restrictions on the use of mental-illness evidence to negate *mens rea*, a substantial majority of the States currently allow it. Brief for United States as *Amicus Curiae* 22–23, and n. 13. The fact that a reasonable number of States restrict this evidence weighs into the analysis, but applying the rule as a *per se* bar, as Arizona does, is so plainly unreasonable that it cannot be sustained.

Putting aside the lack of any legitimate state interest for application of the rule in this case, its irrationality is apparent when considering the evidence that is allowed. See *Washington*, *supra*, at 22 ("The absurdity of the rule is amply demonstrated by the exceptions that have been made to it"). Arizona permits the defendant to introduce, for example, evidence of "behavioral tendencies" to show he did not have the required mental state. See *Mott*, 187 Ariz., at 544, 931 P. 2d, at 1054; *Christensen*, 129 Ariz., at 35–36, 628 P. 2d, at 583–584. While defining mental illness is a difficult matter, the State seems to exclude the evidence one would think most reliable by allowing unexplained and uncategorized tendencies to be introduced while excluding relatively well-understood psychiatric testimony regarding well-documented mental illnesses. It is unclear, moreover, what would have happened in this case had the defendant wanted to testify that he thought Officer Moritz was an alien. If disallowed, it would be tantamount to barring Clark from testifying on his behalf to explain his own actions. If allowed, then Arizona's rule would simply prohibit the corroboration necessary to make sense of Clark's explanation. In sum, the rule forces the jury to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness. This rule has no rational justification and imposes a significant burden upon a straightforward defense: He did not commit

the crime with which he was charged.

These are the reasons for my respectful dissent.